S. HRG. 101-820

# EXCESSIVE DELAYS IN SOCIAL SECURITY DISABILITY APPEALS PROCESS

---

## HEARING

BEFORE THE

SUBCOMMITTEE ON AGING

OF THE

COMMITTEE ON
LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

EXAMINING THE DELAYS OF THE SOCIAL SECURITY ADMINISTRATION IN MAKING DECISIONS FOR SOCIAL SECURITY DISABILITY, MEDICARE AND SUPPLEMENTAL SECURITY INCOME BENEFITS

FEBRUARY 5, 1990
CLEVELAND, OH

Printed for the use of the Committee on Labor and Human Resources

5541-40

U.S. GOVERNMENT PRINTING OFFICE
27-759 ⇆ WASHINGTON : 1990

For sale by Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

## COMMITTEE ON LABOR AND HUMAN RESOURCES

EDWARD M. KENNEDY, Massachusetts, *Chairman*

CLAIBORNE PELL, Rhode Island
HOWARD M. METZENBAUM, Ohio
SPARK M. MATSUNAGA, Hawaii
CHRISTOPHER J. DODD, Connecticut
PAUL SIMON, Illinois
TOM HARKIN, Iowa
BROCK ADAMS, Washington
BARBARA A. MIKULSKI, Maryland

ORRIN G. HATCH, Utah
NANCY LANDON KASSEBAUM, Kansas
JIM JEFFORDS, Vermont
DAN COATS, Indiana
STROM THURMOND, South Carolina
DAVE DURENBERGER, Minnesota
THAD COCHRAN, Mississippi

Nick Littlefield, *Staff Director and Chief Counsel*
Kristine A. Iverson, *Minority Staff Director*

---

### Subcommittee on Aging

SPARK M. MATSUNAGA, Hawaii, *Chairman*

CLAIBORNE PELL, Rhode Island
HOWARD M. METZENBAUM, Ohio
CHRISTOPHER J. DODD, Connecticut
EDWARD M. KENNEDY, Massachusetts

THAD COCHRAN, Mississippi
DAVE DURENBERGER, Minnesota
DAN COATS, Indiana
ORRIN G. HATCH, Utah
(Ex Officio)

Elma Henderson, *Professional Staff Member*
James H. Lofton, *Minority Staff Director*

# CONTENTS

Page

Metzenbaum, Hon. Howard M., a U.S. Senator from the State of Ohio, prepared statement ..... 3

Mitchell-Anderson, Tosca S., daughter, deceased Social Security disability claimant, Cleveland, OH; Norma Johnson, Social Security disability claimant, Columbus, OH; James Van Pelt, Social Security disability claimant, Tallmadge, OH; Brenda Barbash, Social Security disability claimant, Cleveland, OH ..... 5

  Prepared statement of James Van Pelt ..... 15

Braverman, Sheldon L., chairman, workers, compensation and disability section, Association of Trail Lawyers of America, Cleveland, OH ..... 26

  Prepared statement ..... 33

Herman, Leonard F., Director, Bureau of Disability Determination, Columbus, OH; and Hon. Anthony V. Leanza, Chief Administrative Law Judge, Office of Hearings and Appeals, Cleveland, OH ..... 46

  Prepared statements of:

    Mr. Herman ..... 53

    Judge Leanza ..... 62

National Council of Social Security Administration Field Operations Locals, AFGE, Rose Seaman, representative, prepared statement ..... 100

## ADDITIONAL MATERIAL

Communications to:

  Metzenbaum, Hon. Howard M., a U.S. Senator from the State of Ohio, from Eileen Bradley, Associate Commissioner for Hearings and Appeals, dated March 23, 1990 (with attachments) ..... 76

Questions and answers:

  Responses of Leonard F. Herman, Director, Bureau of Disability Determination to questions asked by Senator Metzenbaum ..... 103

# EXCESSIVE DELAYS IN SOCIAL SECURITY DISABILITY APPEALS PROCESS

---

MONDAY, FEBRUARY 5, 1990

U.S. Senate,
Subcommittee on Aging
of the Committee on Labor and Human Resources,
*Cleveland, OH.*

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2975 of the A.J.C. Federal Building, 1240 East Ninth Street, Cleveland, OH, Senator Howard M. Metzenbaum, presiding.

Present: Senator Metzenbaum.

## Opening Statement of Senator Metzenbaum

Senator **Metzenbaum**. Good morning, everybody. I see you here this morning, you found the specific room faster than I did. I kept walking around the halls, even though my own office is on the same floor.

This is an official hearing of the Subcommittee on Aging of the Committee on Labor and Human Resources.

Last summer I wrote to the Social Security Administration deeply concerned that the agency was taking too long to make decisions for Social Security Disability, Medicare and Supplemental Security Income benefits. In that letter I called for an explanation of those delays, noting that they were unacceptable, particularly because we are dealing with the poor, the frail and the elderly. I said I hoped we would not need a congressional hearing to expedite these cases, but it's clear to me that the system is still wracked with delays.

I am hopeful that our hearing today will shed some light on the plight of those caught in the system, and on ideas to cut through this morass. The importance of this task cannot be emphasized enough.

The individuals who take their cases to Social Security need their benefits to survive. Claimants have lost homes, suffered grave financial and emotional hardship and even died before a decision was made. That is totally inexcusable.

These delays often force a person who has supported a family to turn to welfare and the charity of neighbors and kin. That has got to be painful. Fighting the system also can aggravate the health problems that put a person out of work in the first place.

Let me make something clear. We will hear from individuals whose benefit cases are still in limbo. Today's hearing is not to determine whether they are disabled within the law—Social Security already should have done that. But a person clearly should not have to wait months and even years to know where they stand with Social Security.

Nationally, more than 60 per cent of the people who were initially denied benefits won their case when they took it to an administrative law judge. Listen to that, 60 per cent won it when they took it on appeal to the administrative law judge. So more than one out of every two people at this stage were wrongly turned away.

How long did they wait to get what should have been theirs in the first place? On average, it took more than 14 months. Fourteen months that people unable to work had to go without benefits to which they were legally entitled.

And that is only the beginning. Appealing a case as far as possible can take as much as four years, according to the General Accounting Office. Four years. That is their figure. Manuel Noriega will have his criminal case heard more quickly than many of these Social Security claimants.

Today we will also hear from some of the people who decide whether to allow disability benefits. I am particularly interested in the gap between the Bureau of Disability Determination, the first stop for claimants—I point over there, you can see that chart—and the administrative law judges who review claims the Bureau denies.

The Bureau of Disability Determination does not interview claimants face to face. Should they? Should they? And what about the standards for eligibility? Maybe Social Security is asking its people to follow standards that simply do not work.

Some have even called Social Security employees "frustrated angels" —employees who want to help out but are themselves held back by the system. Major staff reductions in the Social Security Administration certainly have been an obstacle. In fact, a representative from AFGE, American Federation of Government Employees, the union representing many Social Security employees, suggests in a statement that the staff cuts have dehumanized the process, for claimants and for workers.

Let us be clear on something else. Social Security disability income is not a handout. It is an insurance program each and every working American contributes to with every paycheck.

Social Security is called to guard the public trust, but the system has not lived up to that trust. Instead, it has violated the very people it is intended to serve. That is why claimants say they feel they have been railroaded, denigrated, beat down until they give up.

I cannot help wondering whether these delays are not so much the result of mismanagement as they are a deliberate policy to break the spirits and the backs of the vulnerable people seeking benefits.

The millions of people who now get disability and supplemental income benefits are a diverse group. There is no one health problem that brings them to the doors of Social Security. Many are elderly or approaching older age, but their plight is not the hot political issue for seniors. These people have no membership association, no support groups, no sophisticated lobbyists to argue their cause in the halls of congress. And because of that, because they must fight for their lives when they are already down, I am compelled to probe this issue to the fullest.

Let me add that after this hearing I intend to submit questions to the Social Security Administration. I expect the agency to participate in this probe. We invited Eileen Bradley, Associate Commissioner in the Office of Hearings and Appeals, to testify at today's hearing. I am very sorry that she turned down that invitation.

Let me say that I do not understand a Social Security system and administration that tells this Senator and this committee that they do not attend hearings outside of Washington. All I have to say to those who run the Social Security system is: "What makes you think that the whole world revolves around Washington? There are 230 million Americans in this country who do not live in the District of Columbia, and somehow you have got the idea that in Washington we rule the world."

I say to the Social Security System that I do not intend them ever again to turn down my invitation to attend a hearing of mine, whether it is in Cleveland or of some other senator in Indiana or Utah or wherever. That is part of their responsibility.

Now, I am told that there are two people here from the Social Security Administration from Chicago. I don't know if they are here. Are there representatives of the Social Security system here from Chicago or anyplace else? (No response.) We were told that they were going to be here. We would have been happy to welcome them.

[The prepared statement of Senator Metzenbaum follows:]

## Prepared Statement of Senator Metzenbaum

Senator **Metzenbaum**. Last summer, I wrote to the Social Security Administration, deeply concerned that the agency was taking too long to make decisions for Social Security disability, Medicare and supplemental security income benefits.

In that letter, I called for an explanation of these delays, noting that they were unacceptable, particularly because we re dealing with the poor, the frail and the elderly.

I said I hoped we would not need a congressional hearing to expedite these cases.

But it's clear to me that the system is still racked with delays. I'm hopeful that our hearing today will shed some light on the plight of those caught in the system—and on ideas to cut through this morass.

The importance of this task can't be emphasized enough.

The individuals who take their case to Social Security need their benefits to survive.

Claimants have lost homes, suffered grave financial and emotional hardship and even died before a decision was made.

That's inexcusable.

These delays often force a person who has supported a family to turn to welfare, and the charity of neighbors and kin. That's got to be painful. Fighting the system also can aggravate the health problems that put a person out of work in the first place.

Let me make something clear.

We'll hear from individuals whose benefit cases are still in limbo. Today's hearing is not to determine whether they are disabled within the law—Social Security already should have done that.

But a person certainly shouldn't have to wait months—and even years—to know where they stand with Social Security.

Nationally, more than 60 percent of the people who were initially denied benefits won their case when they took it to an administrative law judge.

So more than one out of every two people at this stage were wrongly turned away.

How long did they wait to get what should have been theirs in the first place?

On average, it took more than 14 months. Fourteen months that people unable to work had to go without benefits to which they were legally entitled.

That's only the beginning. Appealing a case as far as possible can take 4 years, according to the general accounting office. Four years!

Manuel Noriega will have his criminal case heard more quickly than many of these Social Security claimants!

Today we'll also hear from some of the people who decide whether to allow disability benefits. I'm particularly interested in the gap between the Bureau of Disability Determination—the first stop for claimants—and the administrative law judges who review claims the bureau denies.

The Bureau of Disability Determination doesn't interview claimants face to face. Maybe Social Security is asking its people to follow standards that simply don't work.

Some have even called Social Security employees "frustrated angels"—employees who want to help out but are themselves held back by the system. Major staff reductions in the Social Security Administration certainly have been an obstacle. In fact, a representative from AFGE, the union representing many Social Security employees, suggests in a statement that the staff cuts have dehumanized the process—for claimants and for workers.

Let's be clear on something else.

Social Security disability income is not a handout. It is an insurance program each and every working American contributes to with every paycheck.

Social Security is called to guard the public trust.

But the system has not lived up to that trust. Instead, it has violated the very people it is intended to serve.

That's why claimants say they feel they've been railroaded. Denigrated. Beat down until they give up.

I cannot help wondering whether these delays are not so much the result of mismanagement as they are a deliberate policy to break the spirit and the backs of the vulnerable people seeking benefits.

The millions of people who now get disability and supplemental income benefits are a diverse group.

There is no one health problem that brings them to the doors of Social Security. Many are elderly or approaching older age, but their plight is not the hot political issue for seniors.

These people have no membership association. They have not support groups, no sophisticated lobbyists to argue their cause in the halls of Congress.

And because of that—because they must fight for their lives when they are already down—I am compelled to probe this issue to the fullest.

Let me add that after this hearing, I intend to submit questions to the Social Security Administration. I expect the agency to participate in this probe. We invited Eileen Bradley, associate commissioner in the Office of Hearings and Appeals, to testify at today's hearing. I'm very sorry that she would not do so.

In the meantime, I'm hopeful that our hearing today will be useful and productive. I'd like to thank all our witnesses for joining us today, and ask our first panel to please step forward.

I hope our hearing today will be useful and productive. I would like to thank all of our witnesses for joining us today and ask our first panel, who are prepared, to proceed forward.

The first panel is made up of individuals whose lives have been unalterably disrupted while they await decisions in getting Social Security disability benefits. Each of you has your own story about what delays in the system have meant, and I am aware that it may be somewhat difficult for you to relate your situation. I am very grateful that you are willing to testify, and I want you to know that what you have to say in your own words is very important to this committee and to all of us in the U.S. Senate.

I first want to welcome Norma Johnson of Columbus and Brenda Barbash of Cleveland, James Van Pelt of Tallmadge, all of whom are appealing decisions that denied them disability benefits. I also welcome Tosca Mitchell- Anderson, whose father, Charles Mitchell, Jr., died December 29th, having waited more than two years for a final disability determination from Social Security.

Mrs. Anderson, I want you to know I am very sorry about your father's death. I think you are a very courageous young lady to come here today to tell your father's story, and that is a tribute to him.

I would like to tell all of our witnesses that your statements you have prepared will become a part of the permanent record of this hearing, and you may feel free to summarize your statement if you like. And I will have a few questions for each of you.

We will start with Mrs. Anderson, if you would like to begin. I want you to speak up so we can hear you and take the mike as close to you as possible.

## STATEMENTS OF TOSCA S. MITCHELL-ANDERSON, DAUGHTER, DECEASED SOCIAL SECURITY DISABILITY CLAIMANT, CLEVELAND, OH; NORMA JOHNSON, SOCIAL SECURITY DISABILITY CLAIMANT, COLUMBUS, OH; JAMES VAN PELT, SOCIAL SECURITY DISABILITY CLAIMANT, TALLMADGE, OH; BRENDA BARBASH, SOCIAL SECURITY DISABILITY CLAIMANT, CLEVELAND, OH

Mrs. ANDERSON. My father, Charles Z. Mitchell, Jr., expired on December 29, 1989. He was a victim of a heart attack. Therefore, I would like to express that my father felt very disenchanted and betrayed by the Social Security Department.

The long, tedious process of applying for social security assistance, being rejected, and waiting for a decision to be made after he appealed the rejection made my father weary. This concern and pressure led my father to an early grave.

I would like to express a brief history of my father's life and to inform you of the pain and embarrassment he expressed and what I witnessed.

My father contributed many years to educate himself, as well as working in the system. He graduated from East Tech High School here in Cleveland. There he excelled in academics and sports, lettering in baseball, track, basketball and band.

Following his high school graduation, he went on the road playing professional basketball with the Harlem Hobos. At the end of that career, he chose to continue his education. He attended Central State University, John Carroll University and Howard University. While at Howard University studying Pharmacology, he was drafted into the U.S. Army, where he served in the Intelligence Division. He earned an honorable discharge after serving as a high-speed radio operator in Alaska.

Upon returning home he became the first black administrator of quality control for Carling's Brewery. Following the closing of the brewery, my father entered the field of sales. He became a sales consultant for Anchor Fence Products, followed by C. Miller Chevrolet and later American Chicle Warner Lambert Division. He later went into management at the White Oaks Tavern.

His ultimate career choice was of his own making and wholesaling Mitch's Hot Tamales. This goal was not completed due to my father's deteriorating health, followed by his death.

My father suffered from several physical illnesses, all of which were denied by Social Security. Arteriosclerotic heart disease, prostate gland condition, gout, flatfoot condition and a knee condition. My father lived with these illnesses many years, supporting himself with only Soldier's Relief and general relief. I watched my father's health deteriorate rapidly because of the constant rise in blood pressure, the chest pains and the knee and feet pains that sometimes prevented him from doing much walking.

Once my father realized that he could no longer hold an eight-hour-a-day job, he put his pride aside and applied for financial assistance with Social Security. He began this process in November of 1987 and still had not received any satisfactory answer all the way up to his death. He spent many of his days going to Veterans' Administration Hospital to receive copies of his medical records. He would supply any and all information to Social Security to show he had a legitimate illness. Over the past two years of waiting and being rejected, he decided to seek assistance in following up his social security with Senator Metzenbaum's office.

My father suffered emotionally. The lengthy process of waiting for a decision from Social Security put my father in a major depression. He watched alcoholics and people who had less work experience apply for social security and receive a decision more rapidly. He watched his home deteriorate. He could not afford to have professionals complete work, such as replacing his roof, obtaining a hot water heater, building a new garage. He eventually lost his home owner's insurance because he had so many code violations.

He always felt that he was loyal to his country but that the country was very disloyal to him. He often spoke of how he felt as if he was begging for something the he had not worked for and was not entitled to have.

My father isolated himself from family and friends. He was very embarrassed to be on general relief. He had put many hard years working in the system and deserved to use the benefits he had obtained. He could not maintain the appearance that he would have liked. He even began to doubt himself as to whether or not he was really sick. Because of that he would often push himself too hard and have to spend a lot of time in bed to regain his strength. This constant struggle produced more pressure that added to his massive heart attack.

My father was a very honest, intelligent, hard-working, sensitive and patient individual. I feel that my father was a very special person and he was treated very shabbily. There are no words that I could express to really make you understand the heartache my father endured. My father, by no means, was some lazy person who was out to beat the system. On a fixed income he managed to give me financial support to help me graduate from college. I am very disheartened at the treatment my father received.

The saddest part of all of this is my father was not here to know a favorable decision was granted on January 31, 1990. Even worse, my father, Charles Z. Mitchell, Jr., had to die of the illness, arteriosclerotic heart disease, before anyone at Social Security acknowledged that he had a legitimate disability.

Sincerely, heart-broken, Tosca S. Mitchell-Anderson.

Senator METZENBAUM. It is a very touching statement, and we appreciate the difficulty and how hard it is for you to talk about your dad, who obviously was a wonderful human being and educated—distinguished himself in the work force, in charge of quality control in Carling's, his job at that time, other responsible positions, seeing to it that his daughter got through college. And I just want to say that we know things are difficult for you, and we appreciate your testifying and hopefully your testifying might make it possible for some other person not to have to suffer as your dad suffered.

Let me clarify one thing: At the time of your father's death you actually had no final answer from Social Security?

Mrs. ANDERSON. (Shaking head negatively.)

Senator METZENBAUM. At that time did they tell you the status of his claim?

Mrs. ANDERSON. No. I was told that I would have to submit a death certificate and have that sent in, that I was going to continue to process, and I didn't receive a death certificate until the 24th of January, so when I took it to Social Security, one of the interviewers called and they said that a decision had been made but they weren't allowed to tell me anything.

Senator METZENBAUM. How long had that matter been pending?

Mrs. ANDERSON. His last hearing was on December 19th of 1989.

Senator **Metzenbaum**. About 40 days, approximately speaking. And when you got the word from Social Security, they said he was legally entitled to the benefits?

Mrs. **Anderson**. Right. I received that letter on this past Thursday, which was February 1st of this year.

Senator **Metzenbaum**. Did your father contact a senior center here in Cleveland to get help with his disability benefits?

Mrs. **Anderson**. No.

Senator **Metzenbaum**. He was a very active and ambitious and good citizen of the community. Was it very difficult when he came to the conclusion he would never be able to work again?

Mrs. **Anderson**. Yes. He was sick for quite a while, and I believe that he figured eventually maybe he could work again, and I think it was real hard for him to realize, you know, that eventually maybe he could work again, and I think it was hard for him to realize, you know, that with his illness that he wasn't capable of holding a job, and it was quite a while before he even decided that he would go ahead and apply for social security benefits.

Senator **Metzenbaum**. Do you have any sisters, brothers?

Mrs. **Anderson**. No.

Senator **Metzenbaum**. And where did you graduate?

Mrs. **Anderson**. East Central University in Ada, Oklahoma, about an hour and a half southeast of Oklahoma City.

Senator **Metzenbaum**. And when did you graduate?

Mrs. **Anderson**. In May of 1987.

Senator **Metzenbaum**. I am sure that was a big day in his life. I congratulate you as well, of course. What do you do now, may I ask?

Mrs. **Anderson**. I work for a mental health agency, Community Guidance on 32nd and Euclid.

Senator **Metzenbaum**. If you had it within your power to change one part of the system, what would you propose?

Mrs. **Anderson**. Basically, I feel that there is a need to have more people working, even in the hearing and appeals part that know more about medical benefits, and more time should be spent with each applicant, even if they are rejected, because I don't think in one day you can look at a person and just know that they are sick or not sick and turn them down, or you are not even in the same city with that person and you are the person that makes a decision on whether or not they are ill or not.

Also, I think there is a need to have more people employed with them, because it seems like maybe it's just too much pressure on a certain group of people to get the work done. And even after a decision was reached, I was told in Social Security that they were backed up with typing and that it may take some time for the letter to get out, and I feel like, you know, in every aspect of the Social Security Department maybe there is just not enough people working there.

Senator **Metzenbaum**. I am sure your father would have been very proud of you to know that you were here testifying today, and on his behalf I just want to say thank you very much. Your testimony is very, very helpful to us.

Our next witness is Norma Johnson. Norma, would you like to proceed?

Mrs. JOHNSON. Yes. My name is Norma Johnson. On September 6, 1988, I applied for SSI. On March 14, 1989, 6 months later, I received a notice of denial. April 10, 1989, I requested reconsideration, and on May 31, 1989, reconsideration was denied. November 15, 1989, I had a hearing before the administrative law judge, received notice of denial again on December 6, 1989. At present my case is in the hands of my attorney, Rebecca J. Hope, for Appeals Council Review in Washington, DC

I have not worked since January 13, of 1989. I applied for SSI on the advice of my doctor. I was working for DCSC and had to quit because of the stress and the pressures of the situation on the job. There was a lot of harassment and discrimination. I filed charges, but that only fueled the fire. I began to go to work every day with headaches, and I was living on pain pills and coffee. I lost 47 pounds in a time span of three months. I cried constantly, and I am still having the effects of the stress.

I went to work for a temporary service from October through December of 1987. In January of 1988 I had an attack while driving on the freeway and had to go to the emergency room. I was told that I had Bell's palsy. I was treated for it by a neurologist. The aftereffects of the palsy are that I am not able to drive after dark due to my vision. My eyes are very sensitive to light, headlights, sunlight. My prescription lenses had to be changed to bifocal.

I have been unsuccessful in seeking further employment. My last job interview, I was told that I did not get the position because of the stressful situation on the job. The interviewer stated to me that she did not think I could handle the pressure. That was the last of seven interviews I had with the City of Columbus.

I applied for public assistance (general relief) in January of 1989 when I had the Bells' palsy. I was unable to keep my apartment, because I was only receiving $143 a month and rent was $245 plus gas, electric and phone. I was evicted for nonpayment of rent. I owe back rent of at least $1,300 and unable to rent another apartment. Since that time I have been living with my mother. As of February 1, 1990, my general relief check will be cut to $125 a month because of living with my mother. They don't give me enough to get an apartment, but yet they penalize me for living with my mother. I just feel like evidently I am supposed to live on the street. The past year has been pure hell. I live in pain constantly. I go to bed with pain and get up with pain. I can only sit for 15 to 20 minutes before being in pain.

My nerves are very bad and I have headaches all the time. I have a breathing problem. I walk up a flight of stairs and have to sit down because I can hardly breathe. Some nights I have coughing spells, and I am unable to sleep. If I get the least bit warm, I cough. This has been going on for almost a year. My chest hurts and sometimes I have pains in my chest.

I feel depressed all the time. Sometimes I just want to give up. It seems that no one wants to believe how I feel. The hearing I had before the administrative law judge was very depressing. When I left the hearing all I wanted to do was get drunk. I hadn't drank in at least 10 years. The judge was hard of hearing, and I felt he had a very nasty attitude. He made me feel like I was wasting his time.

Some of the remarks in his decision were not what I said. For instance, one thing he wrote was that I said that taking a cough drop would relieve pain. Anybody with common sense knows that cough drops are not taken for pain. I use cough drops when I have the choking spells at night, to try to relieve the coughing.

Another statement which he made was that my previous work did not involve high amounts of stress. I don't know what world he lives in, but working is stressful in any capacity. My previous field of employment, which he calls unskilled, is clerical. I worked as a clerk, clerk-typist and legal secretary. I have never had a job that there was little or no stress related.

My previous work history is as follows: State of Ohio, Clerk-Typist; Ohio State University, Secretary to Dean; City of Columbus, Clerk-Typist; K-Mart Department Store, Cashier; Defense Construction Supply Center - Federal Government, Clerk-Typist; Legal Aid Society, Legal Secretary; Automation Industries - Vitro Laboratory (security clearance), Secretary; Pickaway Correctional Institute, Unite Secretary; and Bureau of Motor Vehicles, Data Entry Operator.

I am the mother of 5 children and nine grandchildren. I raised my children as a single parent. Their father never supported them. My youngest child was four years of age when I divorced their father. I started working in 1969 and worked up until 1987. All of my children are grown and on their own.

Senator METZENBAUM. Thank you, Mrs. Johnson. Your testimony is very helpful. I have a few questions for you, and I recognize what a difficult time you have had. You have run into some major financial setbacks because you are not working, being forced to live with your mother, forced to accept general relief. On a day-to-day basis, what does that mean to you? Can you afford bus fare even to get to the doctor?

Mrs. JOHNSON. No. I am supposed to go to the doctor every week at least once a week and take breathing treatments. I go every two weeks, because of the bus fare to get there. And also the area of the city that I live in, we have had problems with the bus service in Columbus, and the buses are spread so far apart until it is difficult.

Senator METZENBAUM. Mrs. Johnson, I think you are quite young. As I understand it, you are only 46?

Mrs. JOHNSON. I am 46, and I was told by my attorney that was another problem, my age was against me. If I was 50 or maybe a little older, it would be better.

Senator METZENBAUM. But your disabilities are just the same whether you are 50 or 40 or 30.

Mrs. JOHNSON. That's right.

Senator METZENBAUM. And you have had no success at all in maintaining your case with the Social Security Teleprocessing. What has been the basis for the denials?

Mrs. JOHNSON. The administrative law judge stated that my medical tests didn't verify what I was testifying to stating my physical condition. He just made me feel like I was just—what I said, basically—I was just building it up out of proportion.

Senator **METZENBAUM**. Do you have any question in your own mind as to the reality of your problems which you have been suffering?

Mrs. **JOHNSON**. No, I don't have any question in my mind.

Senator **METZENBAUM**. What does your own doctor say?

Mrs. **JOHNSON**. And my doctor doesn't have any questions neither, because he was the one that told me that I should apply for my SSI.

Senator **METZENBAUM**. Well, I appreciate very much your testimony, Mrs. Johnson. It is very, very helpful to us.

Mrs. **JOHNSON**. You are welcome.

Senator **METZENBAUM**. Our next witness is James Van Pelt of Tallmadge, and he is accompanied by his daughter Melissa. She drove in from New Jersey, as I understand it, and we appreciate both of you being with us. We appreciate your driving in from New Jersey. We hope the roads were good, and driving back, be careful.

Mr. Van Pelt, we want you to summarize for us what your own situation has been.

Mr. **VAN PELT**. I don't know where to even start at. It started when I—about 1981, really. I never had any ailments or anything. In 1989 three and a half tons of concrete fell on my legs and about tore them off. And then, well, it's been about a year and a half now I had a heart bypass, and then after that, about 4 months ago I had a gallbladder, and I just about didn't make it through that either. I quit breathing.

Senator **METZENBAUM**. Let me get that. How many tons of concrete fell on you?

Mr. **VAN PELT**. Three and a half tons.

Senator **METZENBAUM**. Three and a half tons of concrete, and that hit your legs?

Mr. **VAN PELT**. Yes, two inches above my kneecaps.

Senator **METZENBAUM**. Then you had gallbladder—

Mr. **VAN PELT**. That's just been within the last four months, and the last two years I have had two major operations. They say I can't take the stress of working.

Senator **METZENBAUM**. Gallbladder, and what was the other one?

Mr. **VAN PELT**. Heart bypass. Multiple heart bypass.

Senator **METZENBAUM**. And when Social Security said you may have "some discomfort," tell me about your condition, why you feel you can't work.

Mr. **VAN PELT**. I am like everybody else, I feel like I have been let down. I have worked ever since I got out of school.

Senator **METZENBAUM**. How old a man are you?

Mr. **VAN PELT**. I am 53.

Senator **METZENBAUM**. And what kind of work have you done in the past?

Mr. **VAN PELT**. Nothing for the last two years and a half. At the time I had my heart attack I was laid off.

Senator **METZENBAUM**. But what had you been doing?

Mr. **VAN PELT**. Working with concrete—it's like construction, working around cement, stuff like that.

Senator **METZENBAUM**. What kind companies have you worked for?

Mr. VAN PELT. Forest City Dillon, Robinson Clay. I worked for them for 25 years and they went out of business.

Senator METZENBAUM. So you had continuous records of employment for 25 years with one company?

Mr. VAN PELT. Right.

Senator METZENBAUM. Do you think you have the ability to return to work as a forklift operator, which I understand as Social Security indicated, that you could do?

Mr. VAN PELT. Not really, because I can't stay set very long. I have to constantly keep moving.

Senator METZENBAUM. Why is that?

Mr. VAN PELT. Because they hurt.

Senator METZENBAUM. Your legs hurt?

Mr. VAN PELT. Right. And operating the high-lift, I operated one for almost 20 years, you are constantly setting and driving with your legs bent. I don't see nobody drive one yet—

Senator METZENBAUM. Let me ask you another question. when you are working with a forklift, you are lifting up heavy materials?

Mr. VAN PELT. Right.

Senator METZENBAUM. Now, with your heart situation, although you had the bypass—

Mr. VAN PELT. Right. They say I can't take the stress from it.

Senator METZENBAUM. And there is a considerable amount of stress in it?

Mr. VAN PELT. Right. Did you ever set over an engine running all day long humming? After a while it drives you up the wall if you are not used to it.

Senator METZENBAUM. How much medication do you take daily now?

Mr. VAN PELT. Oh, I don't know, there is so much of it.

Senator METZENBAUM. Do you take two pills a day?

Mr. VAN PELT. No.

Senator METZENBAUM. Ten pills?

Mr. VAN PELT. No. I'd say probably 15 or 20.

Senator METZENBAUM. Fifteen or 20 pills a day?

Mr. VAN PELT. Right. I stay hyped up half of the time on account of my heart.

Senator METZENBAUM. What?

Mr. VAN PELT. I stay hyped up, all nervous and every-thing because of so much medication.

Senator METZENBAUM. Sometimes some medicines cause drowsiness, as well?

Mr. VAN PELT. That's right.

Senator METZENBAUM. Has that occurred to you?

Mr. VAN PELT. Right. And then they want me to operate a high-lift?

Senator METZENBAUM. How did the Social Security people decide that you were able to work? Did they see you? Did they have tests made of you?

Mr. VAN PELT. No. They have—I have been since—I mean, that's something I don't understand neither. They send you to all these other doctors that has never seen you, but they won't take the word of the doctor that did the operation on you and all that. I never could understand that, why they send you to all these places.

Senator **Metzenbaum**. When did you first file a claim with Social Security?

Mr. **Van Pelt**. Oh, in 1987.

Senator **Metzenbaum**. And when did you get a decision of a denial, how long after that?

Mr. **Van Pelt**. About 4 months, I imagine, after that.

Senator **Metzenbaum**. I have a record here. Now, let me ask you if this sounds correct to you. May 1988 you filed initial application. October of 1988, that is 5 months later, the application was denied. A month later you filed for reconsideration, and that was denied about 4 months later in March of 1989. In March of 1989 you filed for a hearing with the administrative law judge, and that didn't occur until eight months later when a hearing was held with the administrative law judge. The administrative law judge asked for additional medical evidence. It is now in January of this year you were scheduled for a psychiatric examination. Have you——

Mr. **Van Pelt**. Right, I had that, too.

Senator **Metzenbaum**. And has there been a final decision from the administrative law judge?

Mr. **Van Pelt**. I have never heard from them since.

Senator **Metzenbaum**. But you filed that in March of 1989, and we are in February, so that is eleven months?

Mr. **Van Pelt**. Right.

Senator **Metzenbaum**. Do you think it would take eleven months to decide whether or not you are able to work, whether you are entitled to benefits or not? Do you think that the processes of government are far too slow?

Mr. **Van Pelt**. I think so, yeah. That's why I say I can't see why they send you to all these other doctors. Why don't they take the word of the physician that worked on you? He knows more about me than this other doctor across the street I ain't never seen or knowed and he's never even touched me.

Senator **Metzenbaum**. Was there some delay in your case because three administrative law judges apparently were not able to hear the case and then you were assigned to a fourth?

Mr. **Van Pelt**. Right.

Senator **Metzenbaum**. Is that what happened?

Mr. **Van Pelt**. And he was a foreigner. I couldn't understand him, and my lawyer did most of the talking.

Senator **Metzenbaum**. You couldn't understand the administrative law judge?

Mr. **Van Pelt**. No. The only thing I understood, he held his hand up, and I knew what that meant: he was swearing me in.

Senator **Metzenbaum**. I see. How do you live now?

Mr. **Van Pelt**. Off of my wife.

Senator **Metzenbaum**. She provides the only income that your family has?

Mr. **Van Pelt**. Right.

Senator **Metzenbaum**. Does that bother you that she—

Mr. **Van Pelt**. Yes, it bothers me. I used to be the one that took care of the house and brought the income and money. Now I don't have nothing.

Senator **Metzenbaum**. I think in one of your statements to my staff you indicated that you felt railroaded. Tell me about that.

**Mr. VAN PELT.** I don't know. I just feel like I have, because after I got out of school I went to work, paid taxes like anybody else, and now that I am down and can't work, they are railroading me. I can't get nothing.

**Senator METZENBAUM.** Some people would have given up by this time and said, "Well, the devil with it, I can't possibly——"

**Mr. VAN PELT.** Right. That was my thought exactly. A lot of people gives up and quits, but I won't quit, if I go clear in to Washington. My dad had the same problem that I am having, and that's what happened to him, he had to take it clear in to Washington before he got his.

**Senator METZENBAUM.** Is there anything else you would like to tell us about your matter or your thoughts on this subject?

**Mr. VAN PELT.** I'd just like to be a breadwinner again somehow. They won't let me go back to work, but yet I can't get social security.

**Senator METZENBAUM.** Would you like to go back to work?

**Mr. VAN PELT.** Not really. I have either got pains— since the lady that's setting there beside of you has been to my house, I had to go to the doctor day before yesterday. Now they have got me on patches for my heart and four more different medications.

**Senator METZENBAUM.** What does that do to you?

**Mr. VAN PELT.** That's within the last three or four days.

**Senator METZENBAUM.** Well, I want to say that I think you are very fortunate to have a daughter, Melissa Van Pelt, who came all the way from New Jersey to be with you here, and I think you are fortunate that your wife is supportive and concerned. I hope that your case will proceed promptly and that you will get a fair decision. I understand that many of your neighbors have sent in letters indicating——

**Mr. VAN PELT.** Right.

**Senator METZENBAUM.** [continuing]. Confirming the fact that you have a decline in your physical activity, and I also understand that some of them have actually volunteered to testify in your behalf.

**Mr. VAN PELT.** Right.

**Senator METZENBAUM.** I guess I have to say that there is no reason for your case to take eleven months. I am in no position to decide whether you are entitled to the award or not. It would sound to me as if you are, but I feel that that is not for me to determine. The fact is it is for me to determine how long a case—a case of yours should not take eleven months, that is for sure.

**Mr. VAN PELT.** Right.

**Senator METZENBAUM.** And I very much appreciate your joining us here today, and I also appreciate your daughter coming in as well. All I can say to her is thank you for taking the time and trouble to be with us, and drive carefully going back to New Jersey.

[The prepared statement of Mr. Van Pelt follows:]

## PREPARED STATEMENT OF JAMES VAN PELT

A. The system; it's imperfections.

1) In my case, the report findings were incorrect, unrealistic and unfair.

A. The S.S. explanation of determination stated that, "although I may have some discomfort." How can a panel of people look at written data and tell me what I feel is discomfort and not unbearable pain?"

B. S.S. also concludes that I have the ability to return to work as a fork lift operator. This is misinformation. I was not working under this title when my injury or surgery occurred. In addition, as a fork lift operator, I would be required to sit all day with my legs bent. Only I could possibly know how painful this would be. From the medical standpoint, it would also be dangerous; for a man with arthritis and circulatory problems.

C. In addition, I am taking 18 doses of medication daily- many of which "Cause drowsiness" - who will be responsible for me operating heavy machinery under such conditions?

D. No one from the S.S. office never actually ( ? ) me. They never asked for pictures, never saw my scars with their own eyes.

E. The medical reports also states that I am not permitted outdoors in extreme heat or extreme cold. The S.S. administration makes no mention of this.

B. I waited many months to be assigned a court date and time. However, this also brought about disappointment and frustration.

1) Because the Office of Hearing and Appeals lost three Administrative Judges, I was assigned to a judge from Puerto Rico.

A. This Judge had less than one month to review my case and all others assigned to him. Because of this my, case has still not been resolved yet. All of this is through no fault of my own.

B. Each day that my case is delayed, I sink deeper into debt.

C. Even more, because I have lost my ability to work and to support my family, as a man, I have lost my self-esteem, my position as breadwinner, control of my household and most importantly my pride and now my dignity.

D. This whole ordeal creates much stress. It is frustrating and a major disappointment, considering I am an American Citizen who has paid into this fund every hour I have ever worked. Now due to circumstances beyond my control, I am unable to work.

1) The fund created to help me is now tormenting me; putting me off in my time of need; putting me off in my time of need.

E. My case file also contains letters from neighbors stating my complete decline in physical activities. These people volunteered to testify on my behalf. It is obvious that I am not secretly using my physical activities elsewhere to (?) the system.

F. Summary

The System is denying me in my time of need. They have no real conception of what my physical abilities are. The S.S. system makes me feel like a peon. Because my physical health was taken from me- I am no longer important. Due to this long, haywired system, I live day to day with no income and little hope.

Suggestions:

When a claimant first applies for such benefits, trained personnel should then meet claimant. After this, a real and extensive evaluation could be made. This would enable the S.S. administration to quickly and more effectively sort through the "fakers" or perhaps undeserving people.

LETTER TO MARLENE MOLESKI, SOCIAL SECURITY ADMINISTRATION REGIONAL COMMISSIONER CHICAGO, ILLINOIS FROM MELISSA VAN PELT, DAUGHTER OF JAMES VAN PELT.

March 23, 1989

Melissa Van Pelt
22 Mountain Rd.
Tenafly, NJ 07670

RE: S.S.#234-54-4410

Dear Ms. Moleski,

Enclosed is a copy of a letter that I sent to Mrs. Kelloa, of the akron office, when I learned my father was denied for the second time.

I am hoping to get through to whomever is ultimately overseeing this case. My point, I believe, is made clear in the letter. However, there is additional information I would like to leave with you.

First off, the letter of explaination states these 5 factors are considered:

① Medical information ② Age
③ Education ④ Training
⑤ Work Experience

From this information I sincerely cannot understand your decision. For, I can strongly support the favor of his condition being disabled.

1) Medical information - In June of 1988, my father was told by his leg/bone doctor; Dr. Sturner that he should have no problem claiming his benefits from his medical problems due to his leg alone.

Recently, I have learned that his heart doctor; Dr. Nodam said the same thing of his heart condition.

So my question is, what medical information are you considering? Other than he can walk without assistance? On this subject, I would also like to ask, once again, how can a panel of people look at papers and decide how much pain another man feels. It is impossible and is being underestimated and misunderstood in this case. I can assure you.

2) Age - My father will soon be 53. It may not be the age that one is expected to leave the work place. But, of course, these things have no planned or convenient time to happen.

3) Education - Truely, I do not know what aspect of education is considered here either. High School graduate? As I stated in the fore-mentioned letter, this also means nothing. And there is other important information in this area to be considered.

4) Training - Clearly my father's work training has been physical labor. Nothing but. Again, I ask what aspect has been considered? He has learned to work with his body, to the fullest extent.

5) Work Experience - Both letters harp about his experience for 21 years as a forklift operator. For the record, *this was not the job he had been performing before the injury or surgery. This job was lost. Thus, "how can he return to this work." When the

demand for it died out years ago? This is more misinformation. Furthermore, even so, he would be required to sit (all day) with his legs and knees bent. One would think this would be quite painful and dangrous for someone with arthritis in his leg and circulatory problems.

So my question remains, what aspects, exactly, are being considered in these listed factors?

My point remains, your report findings are incorrect and unfair. Above all, they are certainly unrealistic.

Please. Please consider this information - if it is not already out of your hands. We will continue to follow the rules of the game. But I would like to clarify the misinformation before the case advances. As I stated in the first letter, I am ready for the duration but the whole thing is honestly taxing my father's health.

There is also one other thing I

would like to mention. It has to do with the imperfections of the system.

I know of someone who has never worked an honest full year in their dreadful life. They are now collecting disability. For the money they are, undeservedly, they are now living comfortably. Personally speaking, I am not sure how they slipped thru the cracks of this rigid system, but they did.

Knowing this really burns me. When a deserving man such as my father must endure this battle for his entitled money.

As I stated before, I do understand the guidelines and procedures in these cases. But I would like to remind you of the fallicies and imperfections of the system.

Thank You

Sincerely,

Senator **Metzenbaum**. All right, the next witness in this panel is Brenda Barbash. Brenda, we are happy to have you with us.

Miss **Barbash**. My name is Brenda Barbash, and I have been suffering from postpolio syndrome and carpal tunnel syndrome, bilaterally, for over four years.

Senator **Metzenbaum**. Wait a minute. Go back a minute. What is that, post——

Miss **Barbash**. Post-polio syndrome.

Senator **Metzenbaum**. [continuing]. Polio syndrome.

Miss **Barbash**. And carpal tunnel syndrome, bilaterally —means in both hands.

Senator **Metzenbaum**. What is that syndrome?

Miss **Barbash**. Carpal tunnel syndrome? It means there is pressure being put on the nerve that runs from your shoulder down to your fingertips. I have had surgery three times already for it and I need to have it done again.

Senator **Metzenbaum**. Please proceed.

Miss **Barbash**. My application for disability insurance benefits was filed on May 6, 1987. Since then it has been repeatedly denied by the Social Security Administration. There have been various abuses which have occurred in my case, which I believe to be of public interest.

First, the Appeals Council has had before it my request for review for over 10 months, and they have failed to take any action whatsoever. As a result of the delay by the Appeals Council in reviewing the adverse decision from the administrative law judge, I have completely depleted my savings, my automobile was repossessed, and the bank is going to foreclose on my house.

Second, the Social Security Administration has been insensitive to the granting of my application, based in part on postpolio syndrome. It is my understanding that on July 2, 1987, the Administration issued Transmittal No. 9, SSA Publication No. 68-0424500, which mandates Social Security adjudicators to watch for fatigue, weaknesses, joint and muscle pain, breathing difficulties, increased weakness or pain, and other signs and symptoms of postpolio syndrome. The Procedure and Operations Manual clearly indicates that postpolio survivors—like me—who thought they were in stable condition have had to start using canes, crutches and wheelchairs. It recognizes that functions and abilities which were limited by polio but stable for many years are now being lost.

Although the Social Security Administration has stated a policy of recognizing postpolio syndrome and being sensitive to individuals who are suffering from it, it has disregarded these regulations and procedures in my case. Moreover, the Administration has been insensitive to the signs and symptoms which result from the postpolio syndrome. For an example, at my hearing before the administrative law judge, a medical advisor testified who was Board Certified in Internal Medicine and Psychiatry. Nowhere in my case has anyone who is an expert in polio—and postpolio syndrome—or neurology reviewed my medical records, and my signs and symptoms, which are supported by medical records, and clinical and laboratory tests, including an EMG.

Senator **Metzenbaum**. Tell me, what did that doctor say?

Miss **Barbash**. Well, he said there was no pain associated with carpal tunnel, which if there was no pain, why would I have had surgery? He gave wrong uses for medication. He really knew nothing about polio.

Senator **Metzenbaum**. Did he think that you could work now?

Miss **Barbash**. Yes, he did.

Senator **Metzenbaum**. Now, tell me, what are the disabilities? What are the problems you have at the present time? Can you use your hands?

Miss **Barbash**. No. I have limited use of my hands. I have no fingertip feeling or sensation. (Pressing thumbnail into fingertip.) I don't feel my own nail in my own finger. That is carpal tunnel. The polio, right now I am dripping wet. That is postpolio. I have a lot of pain in my feet and legs.

Senator **Metzenbaum**. Are you able to walk?

Miss **Barbash**. I am able to walk limitedly. I can't go shopping or to a mall without using a scooter.

Senator **Metzenbaum**. So you use a scooter, generally speaking?

Miss **Barbash**. Yes, I do.

Senator **Metzenbaum**. What percentage of the time? I mean, when you are up and around, not when you are in bed.

Miss **Barbash**. Always.

Senator **Metzenbaum**. Always.

Miss **Barbash**. It just got too difficult. Before, it would take me a week to do a week's grocery shopping, one day to do the produce, one day to do the meat, one day to do the canned goods, and now—

Senator **Metzenbaum**. What is the difficulty that you have? Is it the weakness that—

Miss **Barbash**. The weakness and the pain.

Senator **Metzenbaum**. And the pain?

Miss **Barbash**. And pain. Very painful.

Senator **Metzenbaum**. When you walk and when you stand?

Miss **Barbash**. Yes.

Senator **Metzenbaum**. Go ahead, Brenda.

Miss **Barbash**. OK. Furthermore, a vocational expert testified at my hearing and indicated that I could perform various sedentary or light work which necessitated fine manipulation. The jobs identified by the vocational expert are clearly negated by my postpolio syndrome and carpal tunnel syndrome. Additionally, the administrative law judge failed to explain why it disregarded the other two vocational experts' opinions which exist in my record. Both of them stated that there were no jobs that existed in significant numbers in the national economy which I could perform.

And lastly, the adverse decision was allegedly signed by the administrative law judge on March 10, 1989, and it was mailed March 21, 1989. He died on March 12, 1989. He did not sign the decision. I fail to see how any judge can issue a decision after he has died.

In conclusion, I respectfully request that the Subcommittee on Aging continue further investigation into abuses and delays in the Social Security Administration. It is my understanding that many of the problems which have occurred in my case other claimants are having.

I want to thank Senator Metzenbaum and the subcommittee for the opportunity of this input into this process.

Senator **Metzenbaum**. Thank you very much. I might say that I am pleased that there are congress persons in this area are represented by their people. Here we have Congressmen Pease, Oakar, Eckart, and Stokes all represented here today, and I am very pleased. We do work together very well with this congressional delegation.

Now, Miss Barbash, you gave some dramatic examples of your financial hardship that you experienced because you don't have disability benefits. How do you cope on a day-to-day basis? You have no income, you have no money. How do you manage?

Miss **Barbash**. Well, I am receiving welfare of $148 a month.

Senator **Metzenbaum**. A month?

Miss **Barbash**. A month.

Senator **Metzenbaum**. How far does that take you?

Miss **Barbash**. Not very far. I was fortunate enough when I purchased my home to set up an account in case an emergency would arise, and I drew all the money out of that account. I had taken out medical insurance to cover the mortgage payments, so that money is all gone, and the bank is threatening to foreclose. When you wake up every morning in lots of pain and think of everything that is happening to you, around you, that you have no control over, it is very difficult.

Senator **Metzenbaum**. I am going to ask my staff to explore this situation as to how they could issue that decision after his death. He died—it was signed on March 10th, mailed on March 21st, he died on March 12th.

Miss **Barbash**. Right. Your staff did look into it, sir, and there is a letter written by Anthony Leanza, who said that he signed the decision.

Senator **Metzenbaum**. I see. Well, he is here with us today, and it is my understanding and my staff has inquired of him, and he has indicated that he signed those that were completed but not typed at the time of death, and he will explain that to us further when he testifies.

Now, at age 47 you are quite young. Please tell me, when you needed disability benefits, did you ask for help from a local senior center or any other groups?

Miss **Barbash**. I didn't know there were any groups available to help to go to. I went to S.I.L., Services for Independent Living, and they didn't know of anybody except for an attorney who was on their staff, and he was recommended that I use. On the A-9 Code is the attorney they recommended.

Senator **Metzenbaum**. So you had to hire a private lawyer?

Miss **Barbash**. Right.

Senator **Metzenbaum**. And how were you able to pay the private lawyer?

Miss **Barbash**. He doesn't get paid until I get a decision.

Senator **Metzenbaum**. I see. Now, the Social Security has an 800 number which will help claimants. Did you know that?

Miss **Barbash**. No, I did not.

Senator **Metzenbaum**. You began this process in May of 1987, and I know your case file is a thick one. Have you found the Social Security paper work easy to understand and helpful?

Miss **Barbash**. I can't understand why the same form is being sent and remade out so often. It's a vocational report, and If I haven't worked, nothing on a vocational report is going to change. It seems to me there is a lot of unnecessary paper work.

Senator **Metzenbaum**. Obviously, this entire matter has been difficult. Give me some idea how this has made you feel as a human being.

Miss **Barbash**. Well, first of all, I had to adjust to the fact that a disease that I thought I had adjusted to with its limitations is now back and giving me more problems. As I said, I have problems doing daily tasks. I have a very, very small house. It would take me maximum 4 hours top to bottom, and now it takes me an hour a room and then I have to stop and that is all that gets done that day. It is very difficult learning body science so that you know that's it, stop, you can't do anything else.

Senator **Metzenbaum**. Do you live by yourself?

Miss **Barbash**. Yes, I do.

Senator **Metzenbaum**. And what kind of work did you do before you came down with polio?

Miss **Barbash**. I came down with polio in 1949, and I was six years old, and the pain started about seven years ago that I kept saying, "Why do my legs hurt again and why am I falling?" And it took several years before I found a doctor who diagnosed the post-polio syndrome. It is difficult to do what I consider normal tasks. It took me half an hour to get a screw out of the wall the other day, which should have been zip, zap and done.

Senator **Metzenbaum**. I am particularly interested in the wait that you have had so far, as I understand it, 10 months——

Miss **Barbash**. Yes.

Senator **Metzenbaum**. [continuing]. While your case was before the Appeals Council. My records indicate that the Appeals Council has sent my office four notices indicating that they continue to work on your case. What reason have they given you for this delay?

Miss **Barbash**. They haven't. The only communication is that they are still looking over or examining my records, but I don't see how it can take them ten months to look at records.

Senator **Metzenbaum**. Thank you very much, Miss Barbash, for your testimony, and each of the others have been extremely helpful, and I want to express my appreciation to you for taking the time to be with us here today. Thank you very much.

We will now get to our next panel. Our next panel consists of Sheldon Braverman. Sheldon Braverman is a partner in Gaines and Stern law firm here in Cleveland, and he is former chairman of the Workers' Compensation and Disability Section of Trial Lawyers of America, and he is a former member of my law office, as well, which used to be Metzenbaum, Gaines and a lot of other names to it.

We are happy to have you here, Sheldon, and I think, to the best of my knowledge, I think this is the first time you have testified before a committee of mine, or second?

Mr. **Braverman**. First.

Senator **Metzenbaum**. We are happy to have you, and please proceed.

## STATEMENT OF SHELDON L. BRAVERMAN, CHAIRMAN, WORKERS' COMPENSATION AND DISABILITY SECTION, ASSOCIATION OF TRIAL LAWYERS OF AMERICA, CLEVELAND, OH

Mr. **Braverman**. And I sincerely appreciate the opportunity to appear here to express my personal views on the social security disability system.

Let me start out by saying that I note on the schedule today you are going to be hearing from one of the Administrative Law Judges here in Cleveland and that there are other judges present in this room. I would like to say that the problems in the system are not the people that you will be hearing from today and the people that are present in this room. They are conscientious, dedicated and decent people. The problems that I have are not with them. The problems are with the system that has been developed over the years that in many ways does not adequately support truly disabled people.

I have submitted to you today various suggestions of mine which I think should be considered by the U.S. Senate and House for changes in the statutes, which I think will result, hopefully, in a more efficient processing of claims and more appropriate costing.

Senator **Metzenbaum**. Now, the suggestions that you make—and I will ask you to elaborate——

Mr. **Braverman**. Sure.

Senator **Metzenbaum**. [continuing]. In any way are you suggesting anything which would eliminate the right to judiciously determine whether or not the claims should or should not be allowed, because you are an advocate for the claimants?

Mr. **Braverman**. Yes, sir.

Senator **Metzenbaum**. And we respect you for that. The question is this committee sits with an effort to be balanced. There is not an unlimited pot of gold in the government.

Mr. **Braverman**. Correct.

Senator **Metzenbaum**. Are your suggestions having to do with the question of how the cases are decided or are your suggestions how we expedite the procedures so that the time delays are limited?

Mr. **Braverman**. I think many of the time delays can be eliminated if at the initial stages the right things are done to prevent the necessity of appeals.

Senator **Metzenbaum**. Tell us what that is.

Mr. **Braverman**. One way, for example, of preventing that from happening, I believe very much in due process, which you alluded to and believe that in certain proceedings before judges full due process is not awarded, but, if I may, let me go through some of these suggestions that I have, starting from the beginning of the process and going through it.

In fact, it is interesting to note when you look at the process—and you have a document here which talks about the various appeals—it seems to me it would have gone overboard in the numbers of the various stages of the process. For example, there is an initial application process which obviously is necessary and obviously is appropriate. In my opinion, at the initial stages there are not sufficient efforts to obtain all the appropriate and necessary medical information from the treating doctors and from the hospitals where the person has been treated to make a fair initial decision.

Second, I believe that many times at that initial stage level, social security will have doctors look at the records, but they tend to render an opinion having not examined the person and having only looked at what is called the listings of impairments, and you can be disabled even though you do not meet these listings of impairments. Yet they tend to, from my experience, only look at that.

Senator **Metzenbaum**. Is it the fact that there was a concentrated effort, a determined effort, to disallow claimants a period of time during the previous administration, the Reagan Administration, and that they were almost disallowing claims just as a matter of trying to balance the budget, so to speak?

Mr. **Braverman**. Well, there have been some people who know more about the budget than I do who have suggested that that, in fact, is the case. All I can tell you is that my phone was ringing off its hook by people who were being denied and denied quite unfairly during that period of time especially.

Senator **Metzenbaum**. Has that changed? Has that improved?

Mr. **Braverman**. It has changed, we are in a quieter period of time in the system, but there are still many people who are not being treated fairly, and these issues still must be addressed, even though we do not have huge numbers of people who are being denied, obviously, unfairly. It still can be improved and should be improved. But I am so pleased that you and the other members of the Senate are looking into this issue.

Senator **Metzenbaum**. Please proceed.

Mr. **Braverman**. Thank you. When you talk about administrative bureaucracies—and you hear a lot about administrative bureaucracies in the government—I think at the second level of the process called "reconsideration," reconsideration takes place after an initial denial. From my experience, a very, very small percentage of claims are actually changed at this reconsideration level. All they basically do is look at the previous decision, take an additional period of months and, in the vast majority of cases, rubberstamp the denial.

In my opinion, Social Security should look into whether this is necessary or not.

Senator **Metzenbaum**. Are there statistics available as to what percentage of denials occur (conferring with staff members). My staff tells me that about 85 per cent are reaffirmations of the original decision. Does that conform with——

Mr. **Braverman**. That conforms completely with my experience as a practitioner in this area, but if you had asked me to guess, I would have said 80 per cent. So that is very close, absolutely. And obviously that whole process should be looked at as perhaps being unnecessary.

Now let's talk about the administrative law judge level. As an attorney in representing claimants, my first and major responsibility is to review the exhibits and the records that are presently in the file. In order to do an adequate and good job in representing a claimant, it is my opinion that it is not appropriate just to send a letter to the treating doctor asking for a medical report, but I must review what is in the file to determine what the doctor has previously said, what records are there, what additional records must be obtained, what questions specifically should be asked the judge as it relates, perhaps, to the listings of impairments and other medical issues. That analysis takes some time.

While many judges are most helpful in supplying this information to me as an attorney, that is not always the case. They try, but they can't always do it timely, I suspect, because they don't always have the right staff. Some judges—few, but some judges don't let you look at the records until they have a list of the exhibits made up. That is rather irrelevant for my purposes. Sometimes, because they schedule these hearings as fast as they can—and they do, they do try to schedule them as fast as they can—I don't have as much time as I would need to send a letter to the doctors and get a response, because doctors tend to be slow.

So that whole process of obtaining the records as a representative should be looked at.

Quite often the medical information requested from the treating doctors do not relate to the actual issues of the case. And this, I think, is a very essential point. The courts have stated very clearly in the Sixth Circuit—and this basic principle which I am going to express to you applies unanimously, as far as I know, throughout the country—and that basically is this: The opinion of the treating physician is to be given greater weight, should be considered more persuasive than the opinion of a nontreating physician if supported by clinical and objective findings.

This issue, therefore, for the administrative law judge as set forth by the court tends not to be emphasized in the administrative law judge process. At the initial stage or at the administrative law judge stage I have very seldom, if ever, seen the judge ask the treating doctor his opinion as to whether the claimant is disabled with a definition of what disability is and what is necessary to prove disability. It is that simple. They should be asked. The treating doctors tend not to be asked that. I do that in representing the claimant.

The judges tend to take the position based on their own rules and regulations, that the opinion of the treating doctor is not critical in the case, it is not persuasive, that they are to look at the objective and clinical findings. Yet they tend to ignore the court decisions, which are critical in court in determining whether or not the case should be reversed or remanded for a new hearing.

This is a little technical, but I think it is extremely critical for the Senate to look at this issue in determining how the process might be changed or improved.

The administrative law judges are also permitted to call in their own witnesses. You have heard testimony today about medical advisers who testified, of vocational experts who testify. Now, I am involved not only in representing claimants before the Social Security Administration, Senator, but I have also been involved, as you know, in representing people in court in personal injury cases and Workers' Compensation cases, FDLA cases and the like, and I don't know of any other system where I don't have the benefit of potentially adverse testimony before the trial. I don't know of any system like that. To me, it is a matter of basic due process that I should know what the testimony is going to be so I can most effectively present a contrary opinion, if it is not for the claimant, from the treating physician or from even live testimony. I do not have that advantage. I have to sit there and listen and then be prepared to cross-examine.

Senator METZENBAUM. Before the administrative law judge, who represents the Social Security Administration?

Mr. BRAVERMAN. There is no one representing the Social Security Administration. It is not considered an adversarial process.

Senator METZENBAUM. So that you are there representing your client, the administrative law judge is attempting to make a determination and wanting to be balanced, because in a sense he is representing both the government as well as being a judge in connection with the case, although I am certain he or she would not indicate that they are representing the government.

My understanding is that in about 60 per cent of the cases before the administrative law judges the claimant prevails.

Mr. BRAVERMAN. That is correct. That is correct, and many times, in my opinion, the reason they prevail at that stage is because at that stage, for the first time, full, complete and adequate medical information has been submitted for it has not been submitted previously. And I say to you, why hasn't it been submitted? It hasn't been, I would suggest as an answer, because there hasn't been a true, sincere effort to obtain that information prior to the administrative law judge level, and that, I believe, should be corrected.

Senator METZENBAUM. Mr. Braverman, you then, after the administrative law judge, go to the Appeals Council and you go to the Federal court. My question is: Are there too many appellate levels in these cases?

Mr. BRAVERMAN. Oh, yes, I think that—I mean, when you talk about an initial application, reconsideration, administrative law judge and Appeals Council and those are all administrative hearings, I think that is too much when you consider the delay. In my opinion, reconsideration is useless. Obviously, the initial application system can be improved and the administrative law judge hearing is critical and important. My experience with the Appeals Council is that in the vast majority of cases they will either rubber stamp the previous denial or remand it for a new hearing.

Senator METZENBAUM. Do you have any idea of the numbers with respect to cases reversed at the Appeals Council level?

Mr. BRAVERMAN. I do not have the exact numbers. I know it is not great.

Senator METZENBAUM. I have figures here that indicate less than 5 per cent.

Mr. BRAVERMAN. That would seem to be consistent with my experience. Now, what they do in many cases, Senator, is remand the claims for a new hearing, but the reason—and, again, this is just from my experience in representing people, and you are talking about motives here, so it is somewhat subjective—but my subjective opinion is that many times they are remanded when they look at a case and they conclude that if it is appealed to court they are going to lose, so they send it back to an administrative law judge to try to get some more evidence to support the denial. Now, not everyone is going to agree with that, but I have seen that, in my opinion, in some instances.

I am also concerned, as you are, about time delays. We talk about remands. It just so happens that yesterday, in reviewing not only to testify here today, but some papers that were delivered to my house because I was out of town, I received the decision from an administrative law judge, and this is a case—and irrespective of the merits of the case here is a case I noted had been remanded from the Federal court. So we had gone through the whole process, it had been denied all the way through, it went to Federal court. Federal court is an excessively long process. It had been remanded to an administrative law judge from Federal court for a new hearing, and the Appeals Council sends it back to the administrative law judge on December 21,' 88, and the decision in this case did not come out until January 29, 1990.

Senator METZENBAUM. Give me the dates again.

Mr. BRAVERMAN. It was remanded, sent back to the Appeals Council on December 21, 1988. The decision came out January 29, 1990—that is over a year—from Federal court. Now it is going to go back to Federal court again, I would suggest, based on the decision, but we are not here to talk solely on the merits, we are here to talk about delays.

Senator METZENBAUM. It would seem to me that on the basis of the merits——

Mr. BRAVERMAN. That is unbelievable.

Senator METZENBAUM. [continuing]. There can't be too much complaint, 60 per cent of the cases are reversed by the administrative law judge, five per cent at the Appeals Council, 15 per cent at the first appeal level. So it would seem to me that on the substantive question of getting the award, and although some may feel wrongfully denied, that the evidence is reasonable, that that's not the major problem. The major problem is the time delay. Now, do you disagree with that?

Mr. BRAVERMAN. I would perhaps make another focus on your comment. I would suggest that while a 60 per cent reversal rating is perhaps reasonable, I question why it is even necessary that these cases had to be appealed to an administrative law judge and continue it and have a delay there and would suggest that one of the reasons is because adequate information was not obtained initially which could have been. And I would put the emphasis on that to preclude any delays.

Senator METZENBAUM. When you talked about more adequate information, are you impliedly suggesting that it may take a longer time at the lower level?

Mr. BRAVERMAN. No, I think that a sincere process has to be looked at, what information they asked from the treating physicians. They just don't do a good job in asking the right questions to the doctors at the initial levels. They just don't do it like they should. Therefore, people are forced, in many instances, to hire attorneys to obtain that information. That should not always be necessary. I may be talking myself out of some work, but I am here to testify as to what is best, I think, for the people.

Senator **METZENBAUM**. I think another suggestion you made would allow the claimants' representatives to review medical and vocational evidence before a hearing. Is that correct?

Mr. **BRAVERMAN**. That's right. I alluded to that before. You are forced, as an attorney, to go to a hearing with perhaps a doctor testifying called by the Social Security administrative law judge, a vocational expert, without the benefit of what his or her testimony is going to be.

Senator **METZENBAUM**. Do the medical doctors or the vocational advisers ever come in on the side of the claimant?

Mr. **BRAVERMAN**. Sometimes, yes. Sometimes, yes. Often, no. It's also interesting to note—and you will recall I was comparing what the court cases say and what the administrative law judges are told to do, in essence, by Social Security—there are court cases which have been decided by the Sixth Circuit Court of Appeals which were subject to hearing that have said, "The testimony of a medical adviser standing alone is not sufficient to deny benefits," and yet there are instances where I have seen the testimony of the medical adviser standing alone, even though the treating physician fully supports the claimant's disability, has been used as a basis for denying these claims.

I feel sometimes as an attorney I am dealing in different systems; there is one set of rules before the administrative process and the administrative law judges, and I get into court and I am talking about completely different principles and policies. That is unfortunate.

Senator **METZENBAUM**. Would you care to summarize, Mr. Braverman?

Mr. **BRAVERMAN**. Yes. Thank you very much.

In summary, I would suggest that I have set forth for you to consider various changes in the system, basic structural changes, changes in the system which I believe would be——

Senator **METZENBAUM**. Can you summarize those and put them in a nutshell?

Mr. **BRAVERMAN**. Yes, I would be happy to.

Briefly, I would suggest that we should look at how the medical evidence is obtained, what medical evidence is obtained, what questions are asked to the treating physicians prior to the administrative law judge process and that Social Security then fairly evaluate the medical testimony from the treating physicians.

Senator **METZENBAUM**. When you say "how they are obtained," does it seem that you would send somebody out to a doctor asking for an evaluation of him? Expand upon that a little bit.

Mr. **BRAVERMAN**. When it comes to the treating physicians, they send the form out. It is a typewritten form.

Senator **METZENBAUM**. You feel that they ought to get more information from the treating physicians?

Mr. **BRAVERMAN**. They should get more information from the treating physician. They tend not to. If you pick out any ten social security files and you will see medical reports from nontreating physicians that are very lengthy. They go on for page after page after page based on one evaluation and one examination. Yet when it comes to the treating physician, there will be a 2-page piece of paper that is rather skimpy with some very basic questions asked, with no question asked as to whether the person is disabled, with no definition of what "disability" is and no request for an opinion from the treating physician as to whether the claimant is disabled.

Senator METZENBAUM. That is, not asking much that is helpful?

Mr. BRAVERMAN. Absolutely. And that is what is not done. That is what is done when you have competent representation before and administrative law judge, and that is the one reason why so many cases have been reversed. Why not do it earlier?

Senator METZENBAUM. I think it makes a lot of sense. What else?

Mr. BRAVERMAN. Basically, also with the administrative—and I think we should look very carefully as to whether the reconsideration level is still necessary. In my opinion it just causes delay, and it is unnecessary when 85 per cent of those cases are affirmed. I think you should consider face-to-face evaluation at an earlier stage level. I know this has been discussed before and some studies have been done on this. That certainly should be considered.

Senator METZENBAUM. Let me interrupt. The second stage and the Appeals Council?

Mr. BRAVERMAN. The Appeals Council stage, I am not as 100 per cent unalterably opposed to as I am reconsideration, but certainly, at the appeals stage level these lengthy delays in getting decisions from the Appeals Council are just totally, in my opinion, unnecessary, because they are unrealistic delays, when in reality all it is is a necessary step before you can appeal in the Federal court.

Senator METZENBAUM. How big an office is maintained? Is that office in Columbus, is that the reconsideration level?

Mr. BRAVERMAN. Yes, I believe it is.

Senator METZENBAUM. All right, do you have anything further?

Mr. BRAVERMAN. No, Senator. Thank you again for the opportunity.

Senator METZENBAUM. Thank you very much.

[The prepared statement of Mr. Braverman follows:]

## PREPARED STATEMENT OF SHELDON L. BRAVERMAN

### SUGGESTIONS FOR IMPROVING THE PROCESSING OF SOCIAL SECURITY DISABILITY CLAIMS

Presented by Sheldon L. Braverman, 1700 Ohio Savings Plaza, Cleveland, Ohio 44114. Partner in the law firm of Gaines & Stern Co., L.P.A. Former President of The Ohio Academy of Trial Lawyers, The Cleveland Academy of Trial Lawyers, and Chair of the Workers' Compensation and Disability Section of the Association of Trial Lawyers of America.

As a trial lawyer, I limit my practice to representing injured workers before the Industrial Commission and disability victims. In handling Social Security Disability Claims I have represented disabled persons before Administrative Law Judges, the Appeals Council, United States District Courts and The United States Court of Appeals. My experience involves representing hundreds of disabled persons claiming social security benefits since approximately 1974.

The following is an outline of suggestions I would make to improve the processing of claims, avoid unnecessary delays, avoid unnecessary appeals and award benefits to worthy claimants as expeditiously as possible.

1. Initial application level:
    - A. Obtain all appropriate medical information from treating doctors' and hospitals.
    - B. Doctor's who evaluate medical data should not limit their analysis to the Listing of Impairments.
2. Reconsideration Level:
    - A. The necessity of this appeal level should be re-

evaluated. It appears in the vast majority of cases to be of no practical effect.

3. Administrative Law Judge level:
    - A. Files and exhibits should be available for review in sufficient time before requesting additional medical data from the treating physician.
    - B. Medical information requested from the treating doctors should related to the actual issues in the claim. Doctor's are not normally asked their ultimate opinions on the claimants disability along with the supporting data substantiating that opinion.
    - C. The treating doctors are not advised what is necessary to substantiate a disability claim and then asked for their opinion.
    - D. Administrative Law Judges are permitted to call their own witnesses to testify. Examples are medical advisors and vocational advisors. These experts are not required to submit their testimony prior to the hearing. Therefore, the claimants representative, at times, cannot present contrary proof from the claimants own doctors.
    - E. The Administrative Law Judges tend to limit their analysis to the Social Security Regulations promulgated by the Social Security Administration with little or no reference to their own Circuit Court of Appeals decisions. See principles set forth in Allen v. Califano, 613 F.2d 139 (1980), (attached

hereto).

F. The treating physicians opinion as to the claimants disability is required to be given greater weight than the opinion of non-treating physicians when supported by objective and clinical data. This critical standard is often ignored by ALJ's. Often ALJ's give inappropriate preference to non-treating physicians and irrelevent vocational testimony.

G. The burden of proof shifts to the Secretary when the claimant can no longer do his former work. This shifting of proof is often ignored.

  (a) Reconsideration often takes many months for a decision.

  (b) Namely it is a "rubber stamp" for the prior denial.

  (c) At times the Appeals Council will remand the claim, not to award benefits where it was obviously denied improperly, but to attempt to obtain additional proof to bolster the denial of a claim. This also delays the claim.

4. United States District Court Appeals:

A. This appeals process must be preserved. Independent review of these decisions must be preserved in order to protect the integrity of the system.

B. My major problem with the courts is an obvious lack of adequate courts and staff to process these appeals in an expeditious time frame.

## CONCLUSION

While my suggestions should not be interpreted to mean that there are not many honorable and qualified people in the system attempting to do a conscientious job, basic structural changes should be considered to make sure that the truly disabled are granted benefits timely and with dignity.

basis of hospitalization, names of witnesses, right to counsel, and right to remain silent.

Judge Walinski, invoking the *Pullman* doctrine, (*Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941)), abstained, stating in his full and well-reasoned opinion that abstention was proper in order to give Ohio courts an opportunity to construe the statute in the respects in which it is attacked in this proceeding. Since the trial court decided to abstain, it did not resolve appellees' other contention that it should do so under the *Younger* doctrine (*Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)).

We note that, subsequent to Judge Walinski's decision, the Supreme Court has specifically held that proof of mental illness by clear and convincing evidence (as is required by this Ohio statute) meets the requirements of due process. *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

Upon consideration, we conclude that the district court was correct in its decision that abstention was proper under the circumstances presented here. Accordingly, it is Ordered that the judgment below be and it is hereby

AFFIRMED.

**Doris Jean ALLEN, Plaintiff-Appellant,**

**v.**

**Joseph A. CALIFANO, Jr., Secretary of Health, Education and Welfare, Defendant-Appellee.**

**No. 77-1486.**

United States Court of Appeals,
Sixth Circuit.

Argued Oct. 12, 1979.

Decided Jan. 4, 1980.

The Secretary of Health, Education and Welfare denied social security disability benefits. The United States District Court for the Middle District of Tennessee, Northeastern Division, L. Clure Morton, Chief Judge, affirmed, and claimant appealed. The Court of Appeals, Edwards, Chief Judge, held that finding that claimant, a 45-year-old disability claimant who had a medical history that seemed well-nigh impossible to have accumulated in her lifetime, could engage in substantial gainful employment was not supported by the record.

Vacated and returned for remand.

**1. Social Security and Public Welfare 🔑143.45**

Burden of proof is upon claimant to show disability which prevents her from performing any substantial gainful employment for statutory period; once, however, prima facie case that claimant cannot perform her usual work is made, burden shifts to Secretary of Health, Education and Welfare to show that there is work in national economy which she can perform. Social Security Act, § 223, 42 U.S.C.A. § 423.

**2. Social Security and Public Welfare 🔑143.65**

Convincing proof, consisting of lay testimony supported by clinical studies and medical evidence, that pain occasions a claimant's inability to perform his or her usual work is sufficient to make a prima facie case of disability. Social Security Act, § 223, 42 U.S.C.A. § 423.

**3. Social Security and Public Welfare 🔑143.65**

In determining question of substantiality of evidence, reports of physicians who have treated patient over period of time or who are consulted for purposes of treatment are given greater weight than are reports of physicians employed and paid by the government for purpose of defending against a disability claim. Social Security Act, § 205(g), 42 U.S.C.A. § 405(g).

**4. Social Security and Public Welfare ⇐143.55**

Substantiality of the evidence must be based upon record taken as a whole with respect to social security disability claim. Social Security Act, § 205(g), 42 U.S.C.A. § 405(g).

**5. Social Security and Public Welfare ⇐143.75**

Finding by Secretary of Health, Education and Welfare that 45-year-old disability claimant, whose problems included a laminectomy, appendectomy, tubal ligation, herniography, hysterectomy, mastectomy, urinary tract infection, spastic colon, adhesions of the lower bowel, and persistent low back and abdominal pain, could engage in substantial gainful employment was not supported by the record taken as a whole. Social Security Act, §§ 205(g), 223, 42 U.S.C.A. §§ 405(g), 423.

**6. Social Security and Public Welfare ⇐140.20**

Disability claimant's alleged "decline in motivation," which might have been cumulative effect over course of years of claimant's physical problems, medical surgical procedures employed to deal with them, and medications prescribed and taken by claimant, did not constitute basis for denial of disability where claimant's financial situation would normally supply motivation to return to work, where there were no suggestions of malingering, and where claimant, who worked at factory job for many years in between childbirths and her astonishing series of operations, had already demonstrated considerable inclination toward employment. Social Security Act, §§ 205(g), 223, 42 U.S.C.A. §§ 405(g), 423.

Walter K. Crawford, Cookeville, Tenn., for plaintiff-appellant.

Hal D. Hardin, U. S. Atty., William H. Farmer, Margaret Huff, Wm. Gary Blackburn, Nashville, Tenn., for defendant-appellee.

Before EDWARDS, Chief Judge, WEICK, Circuit Judge, and PECK, Senior Circuit Judge.

EDWARDS, Chief Judge.

Appellant Allen seeks reversal of a judgment of the United States District Court for the Middle District of Tennessee affirming denial of Social Security disability benefits previously entered on behalf of the Secretary of Health, Education and Welfare on recommendation of an administrative law judge and the Appeals Council. The case involves an obviously difficult administrative and judicial determination of a Social Security disability claim.

Appellant Allen is a now 45-year-old woman who has a medical record that seems well-nigh impossible to have accumulated in her lifetime. Her problems have included a laminectomy, an appendectomy, tubal ligation, herniography, hysterectomy, mastectomy, urinary tract infection, spastic colon, adhesions of the lower bowel, and persistent low back and abdominal pain. No witness at the administrative hearing disputed any part of the preceding portion of this paragraph. The disputed question is: Nonetheless is Mrs. Allen now suffering from "a physical or mental impairment" which is "medically determinable" and has lasted or can be expected to last for a continuous period of at least 12 months?[1]

---

[1] 42 U.S.C. § 423 (1976) reads in pertinant part:

. . .

(d) Disability. (1) The term "disability" means—

(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; or

(B) in the case of an individual who has attained the age of 55 and is blind (within the meaning of "blindness" as defined in section 416(i)(1) of this title), inability by reason of such blindness to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he has previously engaged with some regularity and over a substantial period of time.

(2) For purposes of paragraph (1)(A)—

(A) an individual (except a widow, surviving divorced wife, or widower for purposes of section 402(e) or (f) of this title) shall be determined to be under a disability only if his

Mrs. Allen appeared without counsel before the Administrative Law Judge. Accordingly, her testimony in response to his patient questioning was somewhat disorganized. Mrs. Allen testified that her first (and it appears only) job was in a shirt factory in Cookeville, Tennessee where she worked for a total of 20 years. Her first factory operation was trimming and matching shirt collars. On returning to work after the birth of her second child, she was put to work sewing on neck buttons. When her third child was born, she did not go back to work until 1964. Then, as to type of work and reasons she left the job in July of 1975, she testified:

> A. Well, I was—I started out rolling collars. And, that hurt my back so bad, that I took pick-up.
>
> Q. Now, explain what you mean by, pick-up.
>
> A. Well, as the girls would fold shirts, and put them on a table, I would put tags on them, if they had to be, and travel boards in them.
>
> And, then, I would set them on another table for the boxing girls.
>
> And, then,—well, about a week, or 2, before I went to the hospital, they put me on folding. And, I reckon I was gone to, you know, fold and pick-up, too. There wasn't enough work on the pick-up.
>
> And, then,—
>
> Q. And, why did you quit your work in July?
>
> A. Well, I got sick in March of last year.
>
> Q. Sick of what? Got sick from what, ma'am?
>
> A. With my stomach.
>
> Q. Well, you say, March of 1975?
>
> A. Uh-huh.
>
> Q. Now, when you say, you got sick with your stomach. Now, tell me a little bit more about that.
>
> A. Well, I had cramps. I almost doubled up with pain, the way I had cramps.
>
> And, I went to Dr. Shipley (phonetic), and he gave me some medicine. And, it didn't go [*sic*] any good. And, I went back, and he gave me some more medicine, and put me on a diet of—5 weeks of milk and crackers.
>
> And, so, then, he put me in the hospital in May.

The ALJ also inquired about her medical history before she left work:

> Q. Have you ever had an operation, Mrs. Allen?
>
> A. Yes.
>
> Q. What was that for?
>
> A. Well, I—the first one I ever had was appendicitis.
>
> And, then, I had a hernia.

---

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

(B) A widow, surviving divorced wife, or widower shall not be determined to be under a disability (for purposes of section 402(e) or (f) of this title) unless his or her physical or mental impairment or impairments are of a level of severity which under regulations prescribed by the Secretary is deemed to be sufficient to preclude an individual from engaging in any gainful activity.

(3) For purposes of this subsection, a "physical or mental impairment" is an impairment that results from anatomical, physiological, or psychological abnormailties which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

(4) The Secretary shall by regulations prescribe the criteria for determining when services performed or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity. Notwithstanding the provisions of paragraph (2), an individual whose services or earnings meet such criteria shall, except for purposes of section 422(c) of this title, be found not to be disabled.

(5) An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existance thereof as the Secretary may require.

And, I had 2 on my breasts.

And, I had my tubes tied.

And, I had a spinal fusion.

And, I had a hysterectomy, when I was 28.

And, I guess that's all.

Q. Was the hysterectomy the last one?

A. No, sir.

Q. When was the most recent—

A. When was the last one?

Q. —uh-huh—operation?

A. Well, the last one was on my breasts. It's been about 2 years, I guess.

Then, I went to—Of course, I had been to Dr. Francis (phonetic) with my stomach.

And Dr. Alper told me to go to a gynecologist, before—

Q. Where does Dr. Francis have his office?

A. Up here on Cedar Street (phonetic).

Q. And, what did you see him about?

A. I went with my stomach.

Q. And, what did he tell you?

A. Well, he just give me some medicine.

And, Dr. Alper told me to go to a gynecologist, before I came back to him.

So, I went to Dr. James Sholl (phonetic).

Q. Where does he have his office?

A. He's here in Cookeville.

And, he told me that he thought I had a bowel obstruction.

Mrs. Allen's oldest son John also testified under the ALJ's questioning:

Q. Now, will you tell me what you've observed, in the way of her physical problems?

A. Well, on many occasions, I'd come in from school and she'd be lying in on—in bed, and she'll say, "there's not much I've been able to do, today, you know, in the house." And, looks pretty bad, still.

She complains that her back hurts. Her stomach cramping. Numerous headaches.

It seems like—I've never known my mother—truthfully, I've never know my mother to feel really good, like she could, you know,- some thing wasn't bothering her.

Q. Well, she said she attempted to work there in the shirt factory.

You're familiar with the fact that she worked there, haven't you (phonetic)?

A. Yes, sir.

Q. That she quit work there in July of 1975. She's testified.

Now, did you notice her discomfort, or complaints, got greater, or what?

A. Well, we used—she would ride home with us from school. Me, my brother, and sister.

And, many times, she'd have to lay down in the back seat, because she just wouldn't feel well enough to sit up and ride.

And, I had always felt that her working there at the shirt factory did intensive her illness, her ailments.

Four qualified physicians, consulted by Mrs. Allen for treatment of her various problems, provided opinions upon her medical problems and/or continued employability.

Dr. Oscar W. Carter of Carter-Spalding Urological Association of Nashville wrote on August 18, 1975:

> We have seen this patient at intervals since 1963 with recurrent bouts of urinary tract infection with a urethral stricture and with a stricture in her lower right ureter.
>
> She has required treatment at intervals of about every three months sometimes more often, sometimes not quite that often. In addition to this she has other medical ailments. We feel that this woman is chronically ill and is probably not able to hold a regular job.

On June 22, 1976, Dr. James W. Shaw provided the following "Discharge Summary" after consultation and examination:

> This patient is a 42 year old Gravida III, para III who has had numerous surgeries in the past. Her complaint is a long

> standing pain in the left lower quadrant which is continuous and also has intermittent episodes of cramping and bloating, especially when she becomes constipated or after she eats. The patient has been admitted to numerous hospitals and has been worked up for this. An upper GI series, BE, IVP's have all been negative. The rest of her history is in her old charts. The patient is currently being treated by Dr. Oscar Carter for the past 12 years for recurrent, urinary tract problems. On admission the patient's vital signs were normal. She is a well developed, well nourished, somewhat slender white female who appears to be in chronic distress. The cardiopulmonary system was physiologic. There are masses from previous breast masses. There are multiple abdominal scars present on the patient. Pelvic exam revealed only an irregular mass fixed in the pelvis which is tender to palpation on the left side which appears to be small bowel. The admission diagnosis is chronic abdominal pain, probably small bowel adhesions. The patient's admission lab work revealed normal urinalysis with WBC 8620 with normal differential and PCV 38. Gynogram was performed on this patient which showed a loop of small bowel in the pelvis. The gynogram reveals a piece of small bowel stuck down in the pelvis. The patient was scheduled for an exploratory laparotomy the day after the gynogram, however, after explanation of the difficulty in removing adhesions and the possibility of the adhesions reforming, and being possible to cause complete bowel obstruction, it was decided by the patient that she attempt to treat this conservatively for some time to see if she can tolerate it. The patient was discharged on LA formula one tsp t.i.d. after meals, Gaviscon foam tabs 2 after each meal and h.s., Talwin compound 2 tablets every 3 hours pr.n. for pain, Ellavil starting at 25 mg h.s. and then increasing to 75 mg h.s. Septra tablets 1 daily in the morning and the evening, Pyridium one daily in the morning and one in the evening. She was given a follow up visit to the office in 2 weeks.
>
> FINAL DIAGNOSIS: Chronic pelvic pain due to small bowel adhesions with probable intermittent partial small bowel obstruction.
>
> COMPLICATIONS: None
>
> OPERATIONS: None
>
> CONSULTATIONS: None
>
> CONDITION ON DISCHARGE: Unimproved

On August 28, 1975, Dr. Ben Alper provided the following "Discharge Summary" after full examination and clinical tests at the West Side Hospital, Nashville, where she had been under examination and treatment from July 1, 1975 to July 27, 1975:

> DISCHARGE SUMMARY: This 43-year old lady was admitted because of abdominal disorder manifested by a lower abdominal cramping. She has been having the symptoms for 3 weeks when she consulted her physician in Cookeville 4 months ago. A mass in her abdomen was suspected and she was hospitalized, but the mass was never confirmed. Her bowel pattern has varied from having 0-5 stools per day, and no diarrhea or mellena noted. She has had intermittent periods of constipation as well. The details of her history and physical are recorded in the admission notes.
>
> Her clinical impression was: 1) Abdominal pain of undetermined etiology, suspect spastic colon, 2) Pulmonary emphysema, rule out.
>
> Sigmoidoscopy examination normal, barium enema and IV pyelogram normal, Treadmill EKG suboptimal undiagnostic.
>
> She was treated with LA formula. Her symptoms subsided. The SMA was normal. Urine culture sterile, white count 8,200 with normal differential, PCV 38%.
>
> DISCHARGE DIAGNOSIS: 1) Spastic colon.

On September 10, 1975, Dr. W. C. Francis provided the following history and comment concerning Mrs. Allen whom he first examined on July 19, 1963 and whom he said he had seen "frequently" in the intervening 12 years:

> This patient has been followed by me since July 1963. She has experienced repeative (*sic*) bladder infections and underwent a urethrotomy in 1963 by Dr. Oscar Carter. The patient has had numerous dilatations of the bladder over the years. She was treated by me for a ruptured disc in July 1966 and a chronic mechanical low back strain. She was hospitalized initially for her ruptured disc. The patient has also experienced a cystocoele and rectocoele. She underwent a simple mastectomy and a urethral dilatation by me in October 1970.
>
> This patient has experienced marked weakness, easy fatigability and severe back pain over the past months. She has been unable to work due to her marked weakness, fatigability, chest pain, and back pain. When last seen by me on 9–5–75 she was having symptoms of angina pectoris due to coronary artery insufficiency, severe low back pain, bladder spasms, marked weakness and fatigue.
>
> The patient appeared frail with marked tension and nervousness. Due to her chronic back strain, ruptured disc, chronic G. U. Tract infections, angina pectoris due to coronary artery insufficiency, and her marked tension from her physical condition, I believe this patient will be permanently disabled to hold down a gainful occupation.

As compared to these four doctors who have been intimately concerned with Mrs. Allen's care, both while she was working and after, the Administrative Law Judge relied in finding no "disability" upon three examinations made at the request of either Social Security or the Disability Determinations Section of the State of Tennessee. One of these doctors was a psychiatrist, Dr. Asher, who opined that he could not "evaluate due to excessive medication." The second was a clinical psychologist, Dr. Copple, who said "I do not find a psychological condition of sufficient severity to prevent gainful employment." The last of these physicians was Dr. Rembert who had a series of tests conducted and furnished this "Comment" to the Disability Section:

> Comment: I think her most likely problem is chronic anxiety and depression. Certainly she had some back surgery about seven years ago there seems to be no difficulty with that now. She has appropriate care for her urinary tract problem. There are no symptoms which suggest angina or any cardiac disease at this time. The masters was within normal limits. All in all I think her problems are psychological in origin and I do not see any permanent disability.
>
> Thank you for allowing me to see her.

Dr. Rembert also checked a form furnished by the Disability Determination Section to indicate "light work."

From these medical reports and the testimony of Mrs. Allen and one of her sons, the ALJ deduced the following findings:

1. The claimant met the special earnings requirements for disability purposes in July of 1975, the date when she stated she became unable to work; and she will continue to meet them at least through the date of this decision.
2. The claimant is approximately 41 years of age, has completed three years in high school and has worked in a shirt factory for some 20 years.
3. The evidence shows that the claimant has no significant kidney, bladder, back, or urinary tract problem. There is nothing to suggest angina or cardiac disease.
4. Although not capable of heavy manual labor, the claimant is otherwise able to function in a normal manner, both mentally and physically.
5. Considering the claimant's physical and mental abilities, her age, her education and work history she would be able to do her regular job inserting tags and travel boards in shirts as well as folding shirts and these jobs are present in the region where the claimant lives.
6. The claimant was not prevented from engaging in substantial gainful activity, on or before the date of this decision, for any continuous period

which has lasted or could be expected to last for at least 12 months.

7. The claimant was not under a "disability" as defined in the Social Security Act, as amended, at any time on or before the date of this decision.

The Appeals Council, the Secretary and the District Court affirmed these findings.

The only question before this court is whether there is "substantial evidence" on this whole record to support the no disability finding entered by the ALJ, the Secretary and the District Judge.

[1–4] We begin our analysis of this case by pointing to four legal propositions which have been repeatedly endorsed by this Circuit in Social Security disability cases:

1. The burden of proof in a claim for Social Security benefits is upon the claimant to show disability which prevents her from performing any substantial gainful employment for the statutory period. Once, however, a prima facia case that claimant cannot perform her usual work is made, the burden shifts to the Secretary to show that there is work in the national economy which she can perform. *Hephner v. Mathews*, 574 F.2d 359, 361 (6th Cir. 1978); *Garrett v. Finch*, 436 F.2d 15, 18 (6th Cir. 1970).

2. Convincing proof, consisting of lay testimony supported by clinical studies and medical evidence, that pain occasions a claimant's inability to perform his or her usual work is sufficient to make a prima facia case. *Beavers v. Secretary of Health, Education and Welfare*, 577 F.2d 383 (6th Cir. 1978); *Noe v. Weinberger*, 512 F.2d 588 (6th Cir. 1975).

3. In determining the question of substantiality of evidence, the reports of physicians who have treated a patient over a period of time or who are consulted for purposes of treatment are given greater weight than are reports of physicians employed and paid by the government for the purpose of defending against a disability claim. *Whitson v. Finch*, 437 F.2d 728, 732 (6th Cir. 1971); *see also Giddings v. Richardson*, 480 F.2d 652 (6th Cir. 1973).

4. Substantiality of the evidence must be based upon the record taken as a whole. *Futernick v. Richardson*, 484 F.2d 647 (6th Cir. 1973).

[5] Applying these principles, we hold that the evidence in this record upon which the ALJ based his finding was not "substantial" within the meaning of the statute.[2]

---

[2] 42 U.S.C. § 405(g) (1976) reads:

**(g) Judicial review.** Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The Court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and

The opinion of the psychiatrist was never expressed and that of the clinical psychologist, of course, went only to whether or not she was psychologically disabled. This record affords no medical evidence of psychological disability.

This leaves Dr. Rembert's examination, diagnosis and "light work" check mark as the foundation of the ALJ and the Secretary's denial of benefits. Dr. Rembert opined that he "did not see any permanent disability.". As to this now 45-year-old woman, we would profoundly hope this might prove to be the case. Our question, however, is whether or not she has been or will be disabled from "any substantial gainful employment" for 12 months or more. We are convinced she has been and may be; but we certainly do not rule out the possibility that time and medical treatment will alleviate the problems testified to above so as to allow her return to the work she desires to resume. If so, the Secretary has ample means to terminate benefits. *See* 42 U.S.C. § 425.[3]

In *Beavers v. Secretary, supra,* Judge Peck wrote for this court:

> The Appeals Council does not appear to be saying it does not believe claimant, but rather that a necessary predicate to considering his testimony, "relevant abnormal findings," is absent. Yet there are clearly relevant, medical "abnormal findings" in evidence, establishing a bona fide physical problem which could be the source of his difficulties. There is no requirement that the underlying medical basis for subjective complaints of pain clearly indicate that such pain would be inevitable. If that were the case, there would be no occasion for subjective, personal testimony in a disability hearing, and a person with pain which eludes precise diagnosis would be excluded from the protection offered by the Social Security disability system. Pain is a highly subjective phenomenon, and each person has an individual "threshold of pain," beyond which he or she is unable to ignore pain and function normally. Determining in an individual case whether suffering has exceeded that threshold, rendering the individual disabled, is necessarily a personal inquiry, and depends heavily on the credibility of the claimant. The plaintiff in this case has provided the Secretary with extensive medical evidence establishing the existence of several physical problems, including a foreign object lodged in his spine, a missing kidney and spleen, degenerative disc disease and arthritis. He has documented a long history of fruitless treatment for severe headaches and leg and back pain. The extent to which these physical problems have resulted in total disability requires further inquiry into the subjective personal testimony by the plaintiff describing his pain.
>
> Although it does not say so explicitly, the Appeals Council could have been following a different path in rejecting the plaintiff's testimony. Its opinion could be interpreted as holding that given the apparently minor abnormalities demonstrated by the medical evidence, Beavers' testimony about his pain was simply not

---

testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

[3] 42 U.S.C. § 425 (1976) reads, in pertinent part:

> If the Secretary, on the basis of information obtained by or submitted to him, believes that an individual entitled to benefits under . . . [42 USC § 423], . . . may have ceased to be under a disability, the Secretary may suspend the payment of benefits under such . . . [42 USC § 402(d), (e), or (f) or 423] until it is determined (as provided in [42 USC § 421]) whether or not such individual's disability has ceased or until the Secretary believes that such disability has not ceased. . . . For purposes of this section, the term "disability" has the meaning assigned to such term in [42 USC § 423(d)].

> credible. If this was in fact its reasoning, we again conclude that the result is not supported by substantial evidence.

577 F.2d at 386.

In *Hephner v. Mathews, supra*, Judge Weick wrote for this court:

> A finding of a capacity to do light work does not constitute evidence that a person can engage in substantial gainful activity, nor is such a finding sufficient to rebut a prima facie case of disability. A claimant's capacity to perform work must be evaluated in light of *his* age, *his* education, *his* work experience, and *his* impairments, including *his* pain. This requires a finding of capacity to work which is expressed, not in terms of a vague catch-all phrase such as "light" work, but in terms of specific types of jobs. *Garrett v. Finch, supra* at 18; *Lane v. Gardner*, 374 F.2d 612, 616 (6th Cir. 1967); *Massey v. Celebrezze*, 345 F.2d 146, 157 (6th Cir. 1965); *Rice v. Celebrezze*, 315 F.2d 7, 15–17 (6th Cir. 1963). *See also Whitson v. Fitch*, 437 F.2d 728, 732 (6th Cir. 1971).

574 F.2d at 362 & 363.

In our opinion, the finding by the Secretary that appellant can engage in substantial gainful employment is not supported by this record taken as a whole.

**[6]** We have considered Dr. Copple's reference to a possible "decline in motivation." There may well have been a cumulative effect over the course of years produced by Mrs. Allen's physical problems, the many surgical procedures employed to deal with them and the medications prescribed and taken to offset pain occasioned by both the problems and the surgery. The human anatomy is, after all, one organism—even though doctors do not always treat it as such.

We do not, however, find this possibility to be a basis for denial of disability. Mrs. Allen can hardly be faulted for accepting the medical advice which was available to her nor can she be faulted for failure of the medical procedures and treatment to return her to a condition where she can work without disabling pain. Mrs. Allen's financial situation (one wage earner's income in the $5,000–$6,000 range for five people),[4] would normally supply motivation to return to work. There are no suggestions of malingering in the opinions of the doctors or in the ALJ's findings. Since Mrs. Allen did work at a factory job for many years in between childbirths and the astonishing series of operations referred to above, she had obviously demonstrated a considerable inclination toward employment.

The judgment below is vacated and the case is returned to the District Court for remand to the Secretary for award of benefits.

---

**UNITED STATES of America,**
**Plaintiff-Appellee,**

v.

**Arthuro MONTANO,**
**Defendant-Appellant.**

**No. 78-5320.**

United States Court of Appeals,
Sixth Circuit.

Argued Dec. 13, 1978.

Decided Jan. 4, 1980.

Defendant was convicted in the United States District Court for the Eastern District of Michigan, Ralph B. Guy, Jr., J., of unlawful possession with intent to distribute cocaine and he appealed. Following remand, 595 F.2d 1226, the Court of Appeals, John W. Peck, Senior Circuit Judge, held that: (1) there was probable cause for a warrantless arrest of defendant; (2) statements volunteered to Drug Enforce-

---

[4] Tuition costs for the two college students may be offset partially or wholly by an ROTC stipend of $100 per month for nine months for one son, and an assistantship for the other son.

Senator METZENBAUM. Our next panel includes two gentlemen—I think they are gentlemen—in the heart of the decision-making process on Social Security disability cases. I welcome Leonard Herman, Director of the Bureau of Disability Determination in Columbus, and The Honorable Anthony Leanza, Chief Administrative Law Judge for the Social Security in the Cleveland office of Hearings and Appeals. We really appreciate very much both of them taking the time to be with us here today.

Mr. Herman, you have a special responsibility. Our previous witness has sort of suggested we ought to put you out of business. So I don't know whether we agree with that at the moment, but I think that it raises an important issue, and I think you ought to address yourself to it. Thank you for being with us.

## STATEMENTS OF LEONARD F. HERMAN, DIRECTOR, BUREAU OF DISABILITY DETERMINATION, COLUMBUS, OH; AND HON. ANTHONY V. LEANZA, CHIEF ADMINISTRATIVE LAW JUDGE, OFFICE OF HEARINGS AND APPEALS, CLEVELAND, OH

Mr. HERMAN. Thank you, Senator. I am most pleased to be here, Senator Metzenbaum, and also would like to extend to you greetings from the Chairman of the Rehabilitation Services Commission, Mr. Ben Bonanno, and my administrator, Mr. Robert Rabe.

I felt I should take a little time and kind of back up to put in perspective the size of the operation that exists in Ohio at the State level which is responsible for the initial evaluation and adjudication of disability claims. It is the Ohio Rehabilitation Services Commission in general and Bureau of Disability Determination which is the one I am responsible for that does handle all the initial and reconsideration disability claims.

Senator METZENBAUM. How big an operation is that?

Mr. HERMAN. Well, last year it was responsible for adjudicating just short of 110,000 claims.

Senator METZENBAUM. By how many people?

Mr. HERMAN. At the moment—excuse me, Senator, I am a page forward of that.

Senator METZENBAUM. Oh, I am sorry. Am I jumping you? Go ahead and get into it.

Mr. HERMAN. During that period there were different levels of claims mentioned by Mr. Braverman. Of those 109,000, just about 74,000 of them were initial claims last year. The remainder were reconsiderations, continuing disability, administrative law judge assistance claims and a large group called "miscellaneous," which can be almost anything.

The initial claims then comprised were 61 per cent regular disability, social security disability, and 39 per cent were SSI claims. Now, actually, we have been discussing time of decision, and so forth, and in general, the Rehabilitation Services Commission that I feel quality service is certainly critical. Quality, however, is comprised of two things: one of which is accuracy of decision; the other one is timeliness of decision, and the Rehabilitation Services Commission has held accuracy, of course, has the prime of these two, although never forgetting that justice delayed is not justice. So there is speed necessary, obviously, also.

The average time now required to do initial Title II disability claims—this was as of last December—just in the State agency is 65.8 days for the Title II and 62.7 for the SSI claims. Now, right now that is about two days less than it takes nationally in other States throughout the Nation. I will be telling you a little later, however, that life wasn't quite that good just not that long ago.

In addition to that there is, of course, time added onto the beginning and the end in the review processes. There are many aspects not done in the State agency that the Social Security Administration must do, taking the claim, transmitting it, working at the tail end of the process, handling benefits coverages, and so forth. There is a review responsibility that is legislatively mandated. So there are a very large number of other activities outside of the medical/vocational area that Social Security must also handle separately, and those take about another 18 or 20 days.

Senator METZENBAUM. What are those, again?

Mr. HERMAN. Initial application, of course, must determine whether the person meets the insured status, whether they meet the income resource tests. They must get statements regarding, obviously, age——

Senator METZENBAUM. Those seem to me to be sort of routine determinations that I would think would be made at the very initial step.

Mr. HERMAN. That is where it is taking place, sir.

Senator METZENBAUM. Not at your step?

Mr. HERMAN. No, I am saying that takes place outside of my office, all of those factors. It is only medical/ vocational that takes place at the Bureau of Disability Determination.

Senator METZENBAUM. Only medical and vocational?

Mr. HERMAN. And my point was those factors, however, do add to the time of a decision, because they must also take place somewhere.

Now, persons not found disabled at the initial level have up to 60 days to request reconsideration, and those are also handled by the Bureau of Disability Determination, and last year there were just over 21,000 of those. Now, clearly, 21,000 is not all of the persons who were disallowed benefits. Those are the ones who chose to pursue the adverse decision. Approximately 37 per cent of the persons were allowed, which means, of course, that 63 per cent were disallowed. A little over half of the people disallowed filed for reconsideration.

Senator METZENBAUM. I thought we had a figure that 85 per cent were disallowed.

Mr. HERMAN. Let me back up, Senator. At the first step, at the initial level, about 63 per cent were disallowed.

Senator METZENBAUM. Oh, before it gets to you?

Mr. HERMAN. No. My first step, about 63 per cent of them are disallowed.

Senator METZENBAUM. OK.

Mr. HERMAN. Of those 63 per cent who are disallowed, about half of them request reconsideration. About half—in Ohio 16 per cent of those are reversed. That's your 85 per cent. I may have confused the issue there. I am sorry.

Senator METZENBAUM. All right.

Mr. HERMAN. Step 1 is the initial adjudication at the State agency.

Senator METZENBAUM. That is the very first decision?

Mr. HERMAN. Correct. Let's deal only with disallowance rates. The disallowance rate would be 63 percent. Those people have a right to a reconsideration.

Senator METZENBAUM. OK.

Mr. HERMAN. About half of them request that reconsideration.

Senator METZENBAUM. And that is at your level?

Mr. HERMAN. Correct. My office then handles the reconsideration, and 84 percent of them are again disallowed. I think that is quite consistent with some of the earlier testimony. The average time on those is approximately 48 days.

Now, what takes place during these 65 days? It seems when one is waiting, obviously, having had situations in my own family, we are waiting for similar things, time seems to go forever when one is on the waiting end. And the ones on the other end trying to do the actions in that period of time, however, the time seems terribly short.

During that time a large number of actions must be successfully carried out to address the wide range of issues involved. Each claim has issues specific to that applicant. The impairments involved are unique to that applicant. The doctors or facility providing treatment have unique processes through which they will receive requests. The recency of the onset is certainly critical. The combination of different impairments that might be present in that client cause different questions.

Routinely, all claims require documentation with medical reports from all treating doctors and other medical facilities from which the applicant had treatment during the preceding 12 months or earlier if the onset was more than 12 months ago. About half of these sources routinely do not respond as quickly as one might desire, so recontact with them by letter or phone is frequently necessary more than once, many times frequently.

Additionally, further contact is required in a large number of claims when the reports are received from different sources regarding the same applicant, it is common material still needed is missing or apparent conflicts have arisen between the different reporting sources. After all reports of treatment are received, the medical information considered essential to a disability decision by Social Security regulations is frequently still not available.

In 30 per cent of the claims, approximately, at the initial level a consultive examination is purchased, which means in 70 per cent of the decisions the decision is made on information submitted by the treating physician.

While the medical documentation process is underway, the claims adjudicator will also be contacting the claimants for necessary details regarding work and other nonmedical information. When all the material is available, both the doctor and the claims adjudicator participate in the decision, and the decision does consider factors way beyond the listings of impairment. There are certainly a huge number of claimants who are granted benefits based on the fact that they may not have the severity equal to the impairments, but the impairment would prevent them from performing work functions sufficiently to prevent them at their age, their education and their work experience from recently being employed. So a large number of awards are not based upon meeting the specific listing.

Senator **Metzenbaum**. Mr. Braverman makes the point that if you ask the attending physician more detailed information, rather than just ask him a couple of questions, but ask him to give you a medical report, that you would be in a better position to make better decisions.

Mr. **Herman**. Yes, I heard Mr. Braverman make that statement. I will say we have tried both approaches. It has been my experience, Senator, that there are some doctors who will give one a wealth of information and gladly. There are some from whom getting information is difficult. We do explain to the doctors, we have mailed out 30,000 booklets within the last couple of years, the title of which is, "What is Social Security Disability?" the purpose of which is to instruct physicians in medical facilities as to what is needed when a request is sent.

Senator **Metzenbaum**. If you sent out a doctor the questionnaire, he is going to answer the questionnaire. Is there anywhere in that questionnaire a statement, "Please feel free to elaborate upon your answers"?

Mr. **Herman**. Yes, Senator, in every letter, "If there is additional information you would feel appropriate, we would be pleased to receive it."

Senator **Metzenbaum**. Mr. Braverman, what is your response to that?

Mr. **Braverman**. Nowhere, in my opinion, from my review of these forms that are sent out at the initial level, is the definition of "disability" set forth clearly, simply and understandably to the treating doctor with a request for an opinion as to whether that claimant is or is not disabled and asking the doctor to set forth the clinical objective findings in support of his opinion. It is that simple, and in my opinion that is what should be asked.

Senator **Metzenbaum**. That testimony is diametrically opposed. Now, it is a fact. What is the fact?

Mr. **Herman**. I don't think the testimony is diametrically opposed, Senator. Mr. Braverman said the definition of disability was not set forth in the letter. I agree it is not. The request for added information they may feel pertinent to the condition is requested, which is what I did say is asked for in the letter.

Senator **Metzenbaum**. Since the more information you have the better able you are to make the decision, why don't you broaden the request?

Mr. **Herman**. The requests are rather broad at the end. It's a definition of "disability" that Mr. Braverman says that isn't there. I agree it is not there. The general——

Senator **Metzenbaum**. You don't ask the doctor for his opinion, or her opinion?

Mr. **Herman**. Yes, we do, Senator.

Senator **Metzenbaum**. I am not quite clear. What is this definition of disability?

Mr. **Herman**. I think the definition of "disability" is the legal definition of "disability." That is not in the letter, I concede that.

Senator METZENBAUM. You don't have to have a—I am just a layman, but I am also a lawyer. It seems to me that I understand what disability is, whether it is a legal definition or a nonlegal definition.

Mr. HERMAN. Yes.

Senator METZENBAUM. So what are we talking about?

Mr. BRAVERMAN. The doctor is not asked whether or not the claimant, (1) performs substantial gainful employment which has lasted or will last for a period of 12 months or longer. That is the definition of "disability" that is in the statute that was passed by the United States Congress. That is the ultimate issue to be determined, and the treating doctor is not asked his opinion on it.

Senator METZENBAUM. Why don't you ask him?

Mr. HERMAN. I concede that, Senator, as to that definition, by these guides and regulations I work by, is defined as an administrative decision that is subject to the Secretary's decision. The question to be asked of the doctor is that they should report on the effects that the impairments have on the work-related functions of the client. That is the manner in which the question is asked per the social security program operations material.

Senator METZENBAUM. I have to tell you, I think we are dealing with piffle and paffle here, and it just doesn't make a whole lot of sense to me, because it is obvious that 60 per cent of the decisions that go up to the next step are being reversed, and it seems to me that if you are to do your job, you ought to have all the information possibly available. If it's going to come in at the administrative law judge case situation, why not get it at the earlier stage and eliminate all that delay and time. I am really having difficulty in comprehending. Now, maybe you know of some rules that don't permit it——

Mr. BRAVERMAN. Yes.

Senator METZENBAUM. If there are some rules that don't permit it, then it's in my department. All right, but you would have no difficulty in asking for that additional information, and it would be helpful to you, would it not?

Mr. HERMAN. I can't categorically say that would change the decision. There are many elements that I think cause what is apparent disagreement between Mr. Braverman and I. However, I don't think he and I have differing goals.

Senator METZENBAUM. All right, proceed on now. If this hearing is to adjourn at 11:30 and it is 11:12, please proceed and see if we do have the answer.

Mr. HERMAN. The other thing I wanted to say earlier—and I will paraphrase here—the time it now takes to do a claim is certainly improved over what it was a year ago when our agency was forced to consolidate from two offices into one and moving the two offices, one from Cincinnati back to Columbus did cause a loss of some rather well-trained staff, and the——

Senator METZENBAUM. How many people do you have in your office?

Mr. HERMAN. Four hundred and sixty, including medical staff.

Senator METZENBAUM. Mr. Braverman suggests that the procedure would work just as well if you eliminated that step.

Mr. HERMAN. Excuse me, Senator. That is for the initial and the reconsideration.

Senator METZENBAUM. How many do you have on reconsideration?

Mr. HERMAN. On reconsideration alone? Only 20 staff.

In spite of the recent improvement, however, the processing time remains higher than it was prior to' 84, the time at which point many labor-intensive changes have entered the program. I am not saying they are bad changes, but I heartily support nearly all of the changes, but they are very labor-intensive. The new psychiatric impairment listings, I think, are very beneficial to the client. They take tremendous time. Specialized psychological review, the process you referred to earlier. Continuing disability medical improvement standards which I heartily support. They take significant time. Pain evaluation procedures. Expansion of the functional capacity procedures. Develop- mental worksheet procedures, etc.

Many other changes have been added, such as those that increased the number of psychiatric claims involved, and psychiatric claims take a lot more time. I feel grateful that we are able to access and interact with that many more psychiatrically impaired individuals, but they do take a lot of time. And with the number of claims the Bureau of Disability Determination deals with, the time that increases work on a claim, only 10 minutes with 100,000 claims very quickly translates into 10 work years of staff time. It doesn't take much to have a tremendous effect on staffing needs.

At the same time these expanding program changes have taken place, the resources available to perform them have tremendously reduced. In 1986 Rehabilitation Services Commission processed just over 88,000 claims with a full-time staff of 592 with a budget just short of $31 million. In 1989 the Rehabilitation Services Commission processed just short of 110,000 claims with a staff of 469, with a budget of again just about $31 million. Thus, over this period there has been a 25 percent increase in work load, a .6 of 1 percent increase in actual dollars, which doesn't say anything to the real dollar, and a reduction of available staff of 123 employees.

Senator METZENBAUM. Let me ask you another question.

Mr. HERMAN. Yes.

Senator METZENBAUM. If 469 people are now getting a little bit more than 592 people were getting, three years' difference, you really must be getting an awful lot of big increases.

Mr. HERMAN. Excuse me, Senator, that is total operating cost to adjudicate the claims.

Senator METZENBAUM. But wouldn't that mean——

Mr. HERMAN. Only a part of that is staff pay.

Senator METZENBAUM. What percentage?

Mr. HERMAN. Less than half of that is staff pay.

Senator METZENBAUM. What is the rest for?

Mr. HERMAN. Medical evaluations. There must be a payment sent to every physician from whom we receive a medical report.

Senator METZENBAUM. How much does he get, or she?

Mr. HERMAN. Each report averages about between $17 and $20.

Senator METZENBAUM. For a medical report?

Mr. HERMAN. Yes.

Senator METZENBAUM. OK.

Mr. **Herman**. The need to provide each person with an accurate decision has been and continues to be a primary goal of RSC/BDD, but to achieve this as quickly as possible is certainly a high priority. The results now being realized under the existing resource situation are considered a clear demonstration of this by Rehabilitation Services Commission.

I would like to touch briefly on something Mr. Braverman said regarding rules and regulations. The Bureau of Disability Determination is governed by a procedure manual called "The Programs Operation Manual System," which is a set of administrative guides. We do not interact directly with the regulations. The claims completed by the Bureau of Disability Determination are subject to review by the Social Security Administration. Their review would indicate that the Ohio Bureau of Disability Determination runs substantially above average on accuracy by their standard.

Senator **Metzenbaum**. Who is this?

Mr. **Herman**. Social Security Administration. Now, that doesn't mean we are perfect, but we run above average. In my judgment—Judge Leanza may wish to respond to this later—the administrative law judge is not directly bound by the same administrative procedure manuals to the degree that the State is. Therefore, the differing decisions are not—in my judgment, can't be viewed as errors. They are different decisions. The administrative law judge has a different latitude. The review process on the administrative law judge is completely different, totally different. The case does not close off at the initial level. The person gets worse or gets better. The claim changes, alters as it moves.

I, too, favor a better initial process. I feel that if it would make any sense in the program at all, it would be to do it right the first time. I think we need to define what "right" is. What is it we are shooting for? That, evaluated by the Social Security review bodies, and is that the same as that being sought at the appeals level?

Thank you, Senator.

[The prepared statement of Mr. Herman follows:]

## PREPARED STATEMENT OF LEONARD F. HERMAN

Mr. Chairman:

The Ohio Rehabilitation Services Commission, Bureau of Disability Determination (RSC/BDD) is the agency responsible for both the medical/vocational claims documentation and determination of medical eligibility for persons residing in the state who have applied for benefits under the Social Security Disability programs. During the past year, 109,579 of these claims were completed, 73,754 of which were initial applications for benefits with the remainder being reconsiderations, continuing disability reviews and miscellaneous actions. The initial claims were comprised of 61% Social Security Disability Insurance (SSDI) claims and 39% Supplemental Security Income (SSI) claims.

The quality of service provided each disability applicant is of prime concern in the agency. The two major indicators of quality are accuracy of action and timeliness. Accuracy as measured by SSA has remained high and is an operating goal which is given priority over processing time in RSC. Time, however, is certainly of major importance and efforts to provide timely service are ongoing.

The average time required for RSC/BDD to process initial claims during the last quarter 1989 was 65.8 days for SSDI claims and 62.7 days for SSI claims. This is approximately 2 days less than the national average for all similar agencies in the other states.

In addition to the time required by RSC/BDD, the Social Security Administration Offices must complete a number of non-medical technical actions. These functions take place both before and after RSC/BDD has acted on the claim and require an average of about 20 days.

Persons not found disabled at the initial level have up to 60 days to request a reconsideration of that decision. RSC/BDD is also responsible for the reconsideration claims and completed a total of 21,236 during 1989. Average time during the last quarter for them was 48.4 days.

During the 62-65 days required by RSC/BDD to adjudicate initial claims, a large number of actions must be successfully carried out to address the wide range of issues involved. Each claim has issues specific to the applicant, the impairments involved, the doctors or facilities providing treatment, recency of onset of the impairments, etc.

Routinely all claims require documentation with medical reports from all treating doctors and/or other medical facilities from which the applicant had treatment during the preceding 12 months or earlier if onset is further in the past. About half of these medical sources routinely do not respond as quickly as desired so recontact with them by letter or phone is frequently necessary. Additionally further contact is required in a large number of claims as when the reports from different sources reporting on the same applicant are reviewed, it is common that certain needed medical findings are missing or apparent conflicts arise that require resolution. After all reports of treatment are received, the medical information considered essential to a disability decision by SSA Regulations is frequently still not available and a consultative examination is needed for approximately 30% of the applicants.

While the medical documentation process is underway, the claims adjudicator will also make the applicant contacts necessary to obtain the details of the work they have performed in the past 15 years and other non medical information. When all medical and vocational information is received, the claims adjudicator and the agency doctor each play a role in the decision. Thus a substantial number of activities and processes are involved in completion of each of the 70,000 + initial claims RSC/BDD evaluates annually. Additionally the average time per case measures include time involved to further document or reevaluate any claims returned to the state by the SSA for any reason prior to effectuation of the decision.

The average time required by RSC/BDD at present to complete its actions on disability claims is approximately 14 days less than it was in December, 1988. At that time the agency was recovering from the nearly year long processing disruptions that accompanied the need to relocate and to consolidate the operation into one location. In spite of this recent improvement, however, the processing time remains higher than it was prior to 1984, the time since which many labor intensive changes have been added to the claims evaluation process, such as:

New Psychiatric Impairment Listings
Specialized Psychiatric Evaluation Requirements
Continuing Disability - Medical Improvement Requirements
Pain Evaluation Procedures
Revision and Expansion of Functional Capacity Procedures
Developmental Worksheet
Evaluation of Multiple Impairment Procedures
Twelve Month Medical Evidence Requirements

These and many other changes have substantially added to the time requirement that effect every claim. It doesn't take a large procedural expansion to seriously effect case processing time as a change requiring only 10 additional minutes for each claim translates into the need for 10 full time equivalent work years for RSC/BDD (109,579 claims X 10 minutes ÷ 60 minutes ÷ the 1,812 hour average productive work year). Changes adding at least 10 minutes per claim have taken place in the last 6 months alone without considering numerous other increases in recent years.

An additional factor effecting time beyond the procedural area has also developed in recent years. This is the large increase in the number of claims involving mental impairments. These claims generally tend to be much more complex and routinely require greater staff time to complete. This then causes an added need for additional time.

At the same time as these time expanding program changes have taken place, the resources available to perform them have been severely limited. In 1986, RSC/BDD processed 88,154 claims with a total full time equivalent staff of 592 and a total budget of $30,893,783. In 1989, 109,579 claims were processed using 469 full time equivalent staff and a total budget of $31,106,381. Thus, over this period there has been a 25% increase in workload with a 6 tenth of 1% increase in dollars available and a reduction of 123 employees to achieve it.

The need to provide each person with an accurate decision has been and continues to be a primary goal of RSC/BDD but the need to achieve this as quickly as possible remains a high priority. The results now being realized under the existing resource situation are considered a clear demonstration of this.

Senator **Metzenbaum**. Thank you, Mr. Herman.

Mr. Leanza, we are very happy to have you with us today. You and I have known each other for a long time, and it is a pleasure to have you appear before my committee this morning.

Judge **Leanza**. Thank you, Senator. I really appreciate the opportunity to be here.

First of all, something that nobody else has brought up is I think you must be commended for taking such an interest in something that very few people take an interest in. You have taken your time and effort to be here, and I think that is wonderful.

I also would like to add that I am speaking here on behalf of myself only and not for the Administration, so anything I say doesn't necessarily apply to the Administration. And before I continue with my statement, I'd also like to introduce to you Judge Ramsey, Judge Carl, both of whom are here, Judge Carl and Judge Ramsey.

Senator **Metzenbaum**. Happy to have you with us.

Judge **Leanza**. We also have our supervisory attorney adviser, Alan J. Zmija. So there is an interest from our entire office.

I got concerned, as have you, concerning the length of time it takes for a case to be heard. You know I have been Administrative Law Judge here in Cleveland for 20 years. Fifteen of those years I have been the Chief Administrative Law Judge. I want to go over what happens to a case when it comes to us, and at this point maybe I ought to mention that the case we get is not the same case that the State agency handles. It's different by the time it gets to us, either because of the passage of time, the person's condition has changed, more medical evidence is available, etc. So what we do does not necessarily reflect upon the State agency.

A request for a hearing is filed after the recon determination. That request for a hearing goes to the district office, is mailed to us, and along with that should come the bulk file or the raw file. Now, the raw file can consist of documents a foot high, and that is probably, in response to Mr. Braverman, that is probably why he can't get the exhibits earlier, or the evidence earlier. We could turn over the raw file to an attorney that wants to see it or to a claimant, but he doesn't get anything out of that. The only time the file means anything to him is after the exhibits are pulled, all the medical evidence is pulled out of that raw file.

When we get the medical evidence, we end up with maybe from 30 to 110 exhibits. The 110-exhibit file is a pretty thick file. At that point only would he be interested in the file. But when is that done? That is after we receive the file and our staff has had an opportunity to go through the raw file and establish an exhibit file. This will take the staff, per case, about one or two days. Our hearing assistant can do that per file in one or two days.

The cases, by the way, as they come into the office, are not put onto a master docket but are assigned to a judge in rotation as they come in.

Now, after the hearing assistant has prepared the exhibit file, the judge will review that exhibit file. He will determine whether he wants additional evidence, whether treating physicians should be contacted, whether pre- or posthearing developments should be performed and whether experts, either in the way of medical evidence, medical experts or vocational experts are needed for the hearing. This will normally take about a 2-month period from the time the request for hearing is filed to the time that it's scheduled for hearing.

Now, before it's scheduled for hearing, notice must be sent out, and we must give at least a 20-day notice of the hearing date. The hearing will then take at least one hour. If there are more witnesses, it will take longer. But normally when you have experts, the claimant with an attorney, you should be able to get rid of the case in 1 hour.

We schedule between 35 and 40 cases a month. Of the cases scheduled, we have been running 85 percent to hearing. The other 15 percent are either dismissed or continued because of the claimant's condition or because the attorney can't make it or some other legitimate reason.

After the hearing the case is closed. At that point in time the attorney will sometimes ask for an opportunity to submit additional evidence. If he requests an opportunity to submit additional evidence that was not available prior to the hearing, it is generally allowed. If it was available prior to the hearing, we don't like to hear about additional evidence at that point in time. He should have had it to us in time, because that only adds to further delay. If you hold up the case for additional evidence that was available, you have to review the file all over again, admit that evidence and make a decision then.

If we need additional consultive examination, it will take about eight weeks to get that examination performed and a report submitted to us. After we have that report, the report is then submitted to the attorney or to the claimant to make comments concerning that additional evidence. That takes 2 weeks' time. So that from the filing of a request for hearing to the time of issuing a decision, an ideal period of time would be 4 months if you are operating at full efficiency.

However, we keep falling behind. We are getting in more cases than we are able to decide, and we are getting out—well, for this past year we have decided 37.5 decisions per judge per month. And, Senator, being an attorney, you know that 37 decisions per month per judge is a lot of work.

We need more staff. This past month—not this past month, I just got the figures this morning—we have 454 decisions that have been made and dictated and are awaiting typing—454 cases waiting to be typed and distributed; 90 of the cases have been shipped out to be typed; 25 to Indianapolis; 25 to Flint; and 40 to Wilkes Barre. That is too many. We ought to have those cases out as soon as they are dictated. We need more staff. We lost staffing. We have eleven word processors in the office. Right now, today, we have got three typists. What is more, Senator, if you remember, we were down to two typists, and at that time the situation got so bad we were one year waiting from the time of request for a hearing to the time of getting the decision.

Senator **Metzenbaum**. Is it that you don't have the money to hire the typist, or that you can't find the typists?

Judge **Leanza**. No. They have got a freeze on us. We have had a freeze on since October of 1988.

We need more judges. We definitely need more judges. We lost three judges, none of which were replaced.

Senator METZENBAUM. Do the funds for your expenses come out of general appropriations, or out of the Social Security funds?

Judge LEANZA. I am not sure. It's a secret. All I know is they tell us we don't have the budget. We are waiting for the budget.

The one other thing that I think I should mention, I mentioned in my written statement, is that we are paying—Social Security is paying for representatives to come in from California to try a case here in Cleveland. We are paying their expenses, travel, per diem, lodging. I think that is a most unfair situation that we have ever had.

Senator METZENBAUM. Very wasteful.

Judge LEANZA. Very wasteful.

Senator METZENBAUM. It's got to be very expensive.

Judge LEANZA. And I keep complaining about it. In fact, I almost got in trouble because I kept complaining about it.

Senator METZENBAUM. What do they say? How do they explain it?

Judge LEANZA. There is a regulation—and I can give you the number of the regulation—that says, because of the Toledo case, that we must pay the travel expenses of these attorneys. Let me tell you how they get these attorneys in the first place. This is even worse. There are insurance companies that cover companies for their workmens' compensation claims. A claimant is drawing benefits from this insurance company because he has filed a workmen's comp case. The insurance has a provision in it that if the claimant gets social security benefits, it will be offset against the amount that they are paid by the insurance company. So the insurance company is very anxious to provide an insurance attorney for the claimant, because they want them to get social security, and they will have to pay less benefit to the claimant. So they will call the claimant and tell them, "We will provide you with an attorney at no cost to you if you are willing to accept it." Well, who is going to turn that offer down?

Then they send an attorney from California to represent the claimant at the social security hearing. We have plenty of attorneys in Cleveland, we have plenty of attorneys in Ohio.

Senator METZENBAUM. And you pay that attorney's fee plus his travel?

Judge LEANZA. That's right. Not only that, but our staff has to prepare a travel voucher for him, make airplane reservations for him, make hotel reservations for him, coordinate this with everybody, and that is taking time from our staff to boot. This is a most——

Senator METZENBAUM. Unbelievable. Go ahead.

Judge LEANZA. [continuing]. Exasperating part of the situation we face today.

Now, Senator, I had a chart prepared which is at the end.

Senator METZENBAUM. Yes, I have it.

Judge LEANZA. And that depicts better than anything I can say how staff reacts to number of decisions and the time spent in getting those decisions out. Reduction in staff——

Senator **Metzenbaum**. Tell me, what is—let's see, the "S" is the staffing; "D" average disposition rate——

Judge **Leanza**. [continuing]. Per judge.

Senator **Metzenbaum**. [continuing]. Per administrative law judge.

Judge **Leanza**. And in red is the staffing.

Senator **Metzenbaum**. I don't have any red.

Judge **Leanza**. You don't? She should have—the one that has the peak in September is the red.

Senator **Metzenbaum**. That's the red?

Judge **Leanza**. Right.

Senator **Metzenbaum**. And that's the staffing?

Judge **Leanza**. That is the staffing. You can see what has happened to our staffing. In September it shot way up, because we sent—we had a lot of cases typed out of our office. We sent a lot of cases out, plus the fact that they asked us to empty our pipeline. Our pipeline is the cases that are being prepared, and as they are——

Senator **Metzenbaum**. Did you get some help on those 400 cases that are pending, still hanging fire waiting to be typed?

Judge **Leanza**. And how we need it. We are not getting it.

Senator **Metzenbaum**. Are some offices less busy than others?

Judge **Leanza**. There are, I am sure.

Senator **Metzenbaum**. Continue.

Judge **Leanza**. But the real answer is staffing in our office. It just doesn't make common sense to take the cases, ship them to another office, get them typed, shipped back to you, when we could use the staffing regularly in our office. Thank you. If you would like me to answer any questions, I can.

[The prepared statement of Judge Leanza follows:]

claimant for comments - an additional 2 weeks. Thereafter, the file hopefully is closed and ready for decision at this point in time. The ALJ will then render a decision and give it to his staff attorney-advisor to dictate a formal decision. The time period for dictation is probably the shortest in the process. The case is then ready for typing in rough. It is at this point that the whole process begins to crumble because of a staff shortage. Since October of 1988 when a hiring freeze was placed upon us, we have lost on ALJ and 11 staff positions. In that same period, transfers to our office consisted of one Hearing Assistant which we sorely needed and one staff attorney. As we lost personnel due to leaving for better paying jobs, moves or other reasons, we had to promote from within from our typing pool. Naturally, the best in the pool received the promotions with no one to fill the slots they vacated. We presently have eleven word processing machines and 4 typists - one of whom is on maternity leave. So you can see, Senator Metzenbaum, we are back in the same status we were many years ago when we were down to two typists and you had to intercede to get us more help. We need your intercession again. As of January 31, 1990, we had 350 cases dictated and waiting to be typed. That represents another month's delay.

Basically lack of adequate support staff is hurting our timely disposition of cases. The number of dispositions is further controlled by the number of Judges on hand. At one time we had eighteen ALJs. We are now down to twelve. Our goal is now at 37 cases per Judge per month. I am only asking for two more Judges to adequately handle our work load. We are told that because of budget restrictions, we cannot obtain any additional personnel. In 1989, we received 5958 cases and decided 5546 cases which gives us a deficit of about 400 cases for the year. In 1982 we had 18 Judges, received 6360 cases and decided 5567. In 1983 when we had a huge influx of cessation cases we averaged 16 Judges and received 6728 cases and decided 6852. In 1984 we had 15 Judges and received 4560 cases and decided 5385. You can see we are doing more with less, but delay is inevitable as a result of fewer Judges, less staff and increased work load.

In addition, over the years the complexities of the cases have changed. The courts are requiring greater and different proofs. The treating physicians' reports must be given more weight or a detailed analysis provided as to why they are not persuasive. If we are to meet this challenge then more intensive questioning must be made of claimants, experts and more post hearing development is needed. With the more complex situations, the Appeals Council must give greater scrutiny to the cases appealed, resulting in more remands. Class actions in different Circuits have resulted in the need to re-adjudicate thousands of cases in light of their various conclusions. For example, one circuit held that the words "the burden shifts to the Secretary", must be included in instances where the claimant could not do his former work. As a result, hundreds if not thousands, of cases were remanded and had to be tried de novo. Each circuit makes its own law, which does create all kinds of problems in administering a national program in a uniform manner. In my view, because of the complexity and various interpretations, there should be created a unified Administrative Law Court of Appeals to which all Social Security cases would be appealed which in turn would develop one body of law and not vary from circuit to circuit. At the present, each inconsistentcy would have to be appealed to the Supreme Court - a virtual impossibility. Consistency would help reduce the national case load.

1. Increase the number of decisions each Judge renders in a specified period of time. We presently are scheduling an average of 40 case per month and rendering an average of 37.5 decisions per ALJ for the year 1989. I don't honestly believe that more can be asked of them.

2. Provide a budget for an adequate number of ALJs (and along with) adequate support staff. In Cleveland, at the minimum, ~~we need two~~ additional Judges with full staff and 7 additional typists.

3. Ban payment of travel expenses for representatives that travel beyond the office service area, except in individual cases wherein travel is justified by the facts and not by the employer. .

For your information, I have taken the liberty of attaching a chart depicting what has happened in the Cleveland Hearing Office this past year. You will note that the disposition of cases is directly related to the number of support staff with two major exceptions. In September we were provided with additional help for typing cases outside the office, which in critical times is fine but I don't believe that such transfers are cost or time effective. Also, the end of the year decline was not only affected by staffing but the usual requests by attorneys or claimants to continue cases following the first of the year.

The Administrative Law Judges and staff in the Cleveland Office of Hearings and Appeals have done an excellent job with the resources available. We will continue to do our best to provide service to the public in a timely and professional manner. I have provided you with my personal thoughts and suggestions on problems facing our office. I ask that you consider them carefully and provide assistance where possible.

As usual, I stand ready to work with you and those in our agency to provide the best available service to the public.

THANK YOU.

The handling of the case from receipt in a unit to final disposition to be handled by a pool creates an inordinate amount of trouble and difficulties in tracking down a particular case for immediate response to a caller. The work involved as noted above by an LPC or H/A is not amenable to easy evaluation if the positions are pooled. The work product degenerates to the lowest common denominator and seldom can fault for errors be ascribed to a particular individual. As we presently operate, each LPC and H/A is responsible for the work of that unit. Dissatisfaction with a particular job can be treated directly without misunderstandings.

COMPUTERS:

Are creating a great deal of duplicate effort, do nothing to offset staff cuts and in fact require additional personnel to operate. Mainframes were not considered and as a result any entry into one computer has to be manually transfered to all the others individually.

Face to face interviews would probably reduce the case load in the hearing office but not sufficiently, in my opinion, to warrant the cost of additional training and hiring new personnel. The reduction of the number of cases weherein a hearing is requested would be insignificant.

RECONSIDERATION:

If that step is removed, it probably would increase the case load by a very small percentage. Remembering that a disability must last for at least one year for eligibility, the processes should provide the lapse of sufficient time to meet this eligibility requirement.

FOREIGN LANGUAGE:

Judicious assignment of judges for travel to areas not normally handled by them should solve this problem. If a Judge's primary language is Spanish, for example, he should not be asked to hear cases where this would be a problem. Trouble with hearing can be handled by technical means, i.e., ear phones with volume controls, etc.

I will be happy to expound on any of these subjects or answer any addittional questions.

At the time we had 15 Judges (with adequate staff) assigned to this office we had no problem providing prompt hearings and decisions. Only so much can be squeezed out of the resources we have, we now must have visiting Judges to help us handle our incoming case load. We should have at least one and probably two more Judges assigned to this office.

My deepest thanks to the Senator for the interest he has shown and for the start of some relief in the form of authority to hire two typists. We still need four more typists.

Sincerely,

Anthony V. Leanza
Hearing Office Chief
Administrative Law Judge

AVL:glo

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Refer to:

Office of Hearings and Appeals
PO Box 3200
Arlington VA 22203

The Honorable Howard M. Metzenbaum
Chairman, Subcommittee on Labor
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510-3502

Dear Senator Metzenbaum:

I am responding to your letter of February 6 regarding the February 5 hearing of the Subcommittee on Aging. As the staff in our Office of Legislation and Congressional Affairs advised your staff, the Social Security Administration (SSA) has a long-standing policy not to send representatives to field hearings, and thus, I was unable to appear in Cleveland to testify. Nonetheless, I appreciate the opportunity to address the Subcommittee's concerns about the time required to adjudicate claims for Social Security Disability, Medicare, and Supplemental Security Income benefits.

In your January 18 letter inviting me to testify, you referred to your concern about the "inordinately long time to review and make decisions" on claims, particularly with reference to appeals, which you had previously written to me about last summer. As I explained in my September 29 response, the Office of Hearings and Appeals (OHA) has a number of initiatives underway to improve both the quality and timeliness of service to the public at the Appeals Council level. Because these letters address the processing time issues you are concerned about, I have enclosed copies.

With regard to case processing at the earlier levels of adjudication, I am enclosing a chart which indicates average processing times and numbers of disability claims decided at each level of adjudication. As you will see, the greatest number of claims are adjudicated by the States' Disability Determination Services (DDS) where processing times are the lowest. Although far fewer cases reach the hearing level, processing times are higher as the decisionmaking process shifts from a paper review to a full-scale, de novo hearing before an Administrative Law Judge (ALJ).

The actual amount of time required to decide Disability and SSI cases has remained relatively steady at the initial and reconsideration steps of the appeals process in recent years, averaging approximately 74 days for the initial decision and 56 days for reconsideration in Fiscal Year 1988. As Mr. Leonard Herman, Director of the Bureau of Disability Determination, indicated in his testimony, processing times in Ohio are below the national average. Processing times are not, however, the only measure of public service; accurate decisions are equally, if not more, important. Thus, SSA is reviewing the initial and reconsideration steps in the process to ensure that decision is both timely and accurate, as well as looking to see if changes in DDS processes would reduce the number of cases appealed to the hearing level.

Workloads at the hearing level have grown dramatically in recent years, primarily because of a large growth in the number of requests for hearing on Medicare claims. The right to a hearing before an ALJ on a Medicare claim was expanded in the 1986 Omnibus Budget Reconciliation Act to include denials of Medicare Part B (Supplementary Medical Insurance) claims which have at least $500 in controversy. Before Congress expanded this right, Medicare hearings were limited to Part A (Hospital Insurance) claims only. At the same time, the rate of appeal in Medicare Part A cases began to rise significantly. As recently as Fiscal Year 1986, requests for hearing in Part A Medicare cases comprised less than two percent of OHA's overall hearing workload, or slightly over 5,000 cases. By Fiscal Year 1988, requests for Part A hearings had nearly tripled to 14,000. Thus, by the close of Fiscal Year 1989, Medicare cases comprised over 7 percent of OHA's workload at the hearing level, and the percentage is continuing to grow.

As a result of growing workloads at the hearing level, processing times rose from 198 days in Fiscal Year 1987 to 216 days in Fiscal Year 1988. We have instituted a number of initiatives to address this problem, and the average processing time has now been reduced to 212 days at the end of 1989. In addition to hiring over 135 new ALJs and related support staff in hearing offices around the country in Fiscal Years 1988 and 1989, we have developed programs to balance workloads among offices and adopted innovative ways to address recurring problems. For example, in some large metropolitan areas around the country, Federal pay scales for clerical staff are not competitive with the private sector. Thus Federal agencies, OHA included, are often the training ground for a clerical staff which soon moves on to other, better-paid employment. To address this problem, we have established word processing centers in localities where

## SOCIAL SECURITY AND SSI DISABILITY DECISIONS: FISCAL YEAR 1988

| Initial Determinations: | Totals | Processing Times (in days) |
|---|---|---|
| Total Number......... | 1,516,873 | 74 |
| Percent Allowed: | 36% | |
| Percent Denied: | 64% | |
| Percent Appealed: | 45% | |
| Reconsiderations: | | |
| Total Number......... | 438,251 | 56 |
| Percent Allowed: | 14% | |
| Percent Denied: | 86% | |
| Percent Appealed: | 69% | |
| ALJ Dispositions: | | |
| Total Number......... | 258,421 | 216 |
| Percent Allowed: | 57% | |
| Percent Denied: | 32% | |
| Percent Dismissed: | 11% | |
| Percent Appealed: | 68% | |
| Appeals Council Dispositions: | | |
| Total Number......... | 57,193 | 100 |
| Percent Allowed: | 5% | |
| Percent Remanded: | 26% | |
| Percent Denied: | 69% | |

## PANEL II: SHELDON L. BRAVERMAN

INITIAL APPLICATION LEVEL:

SUGGESTIONS:

A. Obtain all appropriate medical information from treating doctors and hospitals.

B. Doctors who evaluate medical data should not limit their analysis to the Listing of Impairments.

RESPONSE:

A. SSA's policy is to obtain all appropriate medical information from all sources, including treating physicians and hospitals.

B. This suggestion is not entirely clear. We ask treating physicians to provide information about the claimant's medical history, clinical and laboratory findings, medical diagnoses and prescribed treatment. We also ask treating physicians to provide overall medical assessments regarding the claimant's ability to do work-related activities. Thus, treating physicians would not limit their analysis to the Listing of Impairments.

Program physicians on the staff of the DDS play a significant role throughout the sequential evaluation process. They determine whether an impairment(s) is severe at Step 2, whether the Listings have been met or equalled at Step 3, and the claimant's residual functional capacity to do past or other work at Steps 4 and 5.

RECONSIDERATION LEVEL:

SUGGESTION:

A. The necessity of this appeal level should be re-evaluated. It appears in the vast majority of cases to be of no practical effect.

RESPONSE:

A. Although the percentage of cases allowed at this level is smaller than at the initial level, the absolute numbers are still very significant. In Fiscal Year 1988, over 60,000 disability claimants received a favorable decision at the reconsideration level in an average of less than 60 days. If the level were eliminated, these claimants would have had

RESPONSE:[Regarding ALJ hearings]

D. ALJs do not call "their own" witnesses; rather, they call impartial expert witnesses. (Claimants may cross-examine the expert witness and call an expert witness of their own choosing to testify.) Expert witnesses cannot "submit their testimony in advance" of the hearing because claimants have the right (which they usually exercise) to bring new and additional evidence **to the hearing.** Thus, the expert must review not only the pre-hearing record, but the full record at the time of the hearing, in order to testify fully and fairly. The claimant and representative know in advance the issues to be decided, what expert, if any, the ALJ will call to testify, and the matters the expert will be testifying about. At the hearing, the claimant and representative have a full opportunity to cross-examine the expert. Finally, if the claimant or representative believes that the expert's testimony needs to be rebutted, he or she may submit further rebuttal evidence after the hearing.

E. The Social Security Administration recently published final regulations regarding the application of circuit court law, a copy of which is enclosed. In brief, the regulations provide that SSA will acquiesce in the holdings of circuit court decisions which conflict with SSA's interpretation of the statute or regulations. Thus, if the holding in a circuit court decision does conflict, the agency will instruct all adjudicators, including ALJs, how to apply the decision.

If, on the other hand, a circuit court decision does **not** conflict, there is generally no reason for an ALJ to "refer" to the decision. Nonetheless, to enhance the legal defensibility of ALJ decisions and make it clear to reviewing courts that circuit court case law has been considered in reaching decisions, we summarize leading circuit court decisions on key issues and provide that information to the ALJs in the Circuit Court Reporter.

F. SSA recognizes that the treating source is in the best position to assess the claimant's medical condition. Consistent with the statute, however, SSA's policy is to accord the greatest weight to "objective and clinical data," whenever such data are available. Thus, a physician's "opinion" which was supported by such data would be accorded the most weight. When the "objective and clinical data" are not determinative in and of themselves, SSA's policy is to accord greater weight to the opinion of a treating physician than to the opinion of an examining or nonexamining physician.

SUGGESTION: [Regarding the administrative process]

G. The burden of proof shifts to the Secretary when the claimant can no longer do his former work. This shifting of proof is often ignored.

(a) Reconsideration often takes many months for a decision.

(b) Namely it is a "rubber stamp" for the prior denial.

(c) At times the Appeals Council will remand the claim, not to award benefits where it was obviously denied improperly, but to attempt to obtain additional proof to bolster the denial of a claim. This also delays the claim.

RESPONSE:

G. Although the regulations do not explicitly state that the "burden of proof" shifts to the Secretary at the final step in the sequential evaluation process, SSA has always assumed that burden at the final step. ALJs have been directed to explicitly state the "shift in burden" in their decisions, and the Appeals Council has been directed to enforce this requirement in reviewing cases on appeal.

With regard to reconsideration, processing times are currently less than 60 days, and as noted earlier, thousands of claimants are allowed each year at this step in the appeals process.

Finally, the Appeals Council does assume jurisdiction and issues a decision when it has sufficient evidence to do so. It only remands a case when additional proceedings or evidence are necessary to build a proper record for decision. The Council is an appellate body which does not conduct its own evidentiary proceedings; that "fact-finder" role belongs to the ALJ. Thus, the Council never remands a case to "bolster the denial of claim" or for any purpose other than to have an ALJ consider additional evidence and/or conduct additional proceedings.

SUGGESTION: (Regarding District Court Appeals)

A. This appeals process must be preserved. Independent review of these decisions must be preserved in order to protect the integrity of the system.

RESPONSE:

A. A number of structural changes to the Federal court system, including some which address Social Security cases, are now being considered by the Federal Courts Study Committee. The Committee expects to send its final report to the President and the Congress in April 1990.

## PANEL III: LEONARD F. HERMAN AND ANTHONY LEANZA

(MR. HERMAN MADE NO SUGGESTIONS FOR CHANGE.)

SUGGESTIONS BY JUDGE LEANZA:

Increase staff in the Cleveland Hearing Office, especially clerical staff.

RESPONSE:

As noted in the cover letter, sequestration under the Budget Reduction Act required SSA to postpone and reassess its original hiring plans for FY 1990. As Judge Leanza indicated in his testimony, OHA has addressed the Cleveland Hearing Office's typing backlogs through outside assistance from OHA's word processing centers and other hearing offices. To address the Cleveland Hearing Office's need for additional clerical staff, we have recently authorized the office to begin recruiting for clerical staff.

SUGGESTION:

Establish "a unified Administrative Law Court of Appeals to which all Social Security cases would be appealed."

RESPONSE:

This proposal would establish a new Court of Appeals to decide all appeals from Federal District Court decisions in Social Security cases. The Department of Justice is responsible for establishing the Administration's position on proposals to change the Federal court system. As noted above in response to Mr. Braverman's suggestion that District Court review be retained, the Federal Courts Study Committee is considering a number of structural changes to the Federal court system. The Committee expects to send its final report to the President and the Congress in April 1990.

SUGGESTION:

Restrict the practice of paying the expenses of claimant representatives who travel long distances to attend hearings.

RESPONSE:

We agree with Judge Leanza's suggestion. We are working to formulate a proposal to control this expenditure of taxpayers' monies and have discussed this issue with Congressional staff. At present, the Social Security Act authorizes the payment of travel expenses "to parties, their representatives, and all reasonably necessary witnesses...to attend...proceedings before administrative law judges." Because the Congress did not foresee the possibility that claimant representatives would develop "nationwide" practices and seek reimbursement for long-distance travel, neither the Act nor the sparse legislative history provides the Secretary with the authority to limit reimbursement of travel expenses by imposing restrictions in regulations.

Because there are many qualified representatives within hearing office service areas, we do not believe that reimbursing representatives to travel at taxpayers' expense can be justified. In addition, as Judge Leanza indicated, making arrangements for such long-distance travel places an unnecessary burden on hearing office staff.

SUGGESTION:

Revise the policy regarding photocopying files for claimant representatives and provide newer photocopy machines to the hearing offices.

RESPONSE:

We understand Judge Leanza's concern about the impact on hearing office resources to photocopy files for claimant representatives. Hearing office managers are free to experiment with a variety of approaches in meeting the requirement that claimants and representatives have an opportunity to review the file prior to the hearing. Often simply making the files available for inspection at a time convenient for the representative reduces the need to actually photocopy the entire claims file. Some offices do permit representatives to make their own copies (i.e., use the office's photocopy machine). The hearing offices which have experimented with this approach have sometimes discovered that inexperienced persons can cause equipment malfunctions. Moreover, hearing offices must be careful to maintain the confidentiality of personal information in claims files, and thus, they may not allow a representative unlimited access to the work areas in the hearing office. Nonetheless, in offices with the proper physical layout and instructional program, the approach has worked; in others, it has not.

With regard to procuring new photocopy machines for hearing offices, OHA is participating in SSA-wide pilot programs to evaluate and redefine photocopier needs in various SSA facilities, including the hearing offices. We expect these evaluations will result in photocopier specifications which take better account of OHA's needs.

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Social Security Administration**

**20 CFR Parts 404, 410, 416, and 422**

**RIN 0960-AB63**

## Federal Old-Age, Survivors, and Disability Insurance Benefits; Black Lung Benefits; Supplemental Security Income for the Aged, Blind, and Disabled; Organization and Procedures; Application of Circuit Court Law

**AGENCY:** Social Security Administration, HHS.

**ACTION:** Final rule.

---

**SUMMARY:** These final regulations implement a new policy for applying holdings of the United States Courts of Appeals that we determine conflict with Social Security Administration (SSA) policy in adjudicating claims under title II and title XVI of the Social Security Act (the Act) and title IV, Part B of the Federal Mine Safety and Health Act of 1977. The regulations explain the manner in which we will apply these holdings, and as part of that policy, describe the limited conditions under which we may decide to relitigate the issue(s) decided by a circuit court in a particular case.

**EFFECTIVE DATES:** These amendments are effective January 11, 1990.

**FOR FURTHER INFORMATION CONTACT:** Philip Berge, Legal Assistant, 3-B-4 Operations Building, 6401 Security Boulevard, Baltimore, Maryland 21235, (301) 965-1769.

**SUPPLEMENTARY INFORMATION:** On November 18, 1988, we published at 53 FR 46628 proposed rules to implement a new policy for applying circuit court holdings that conflict with SSA policy. In general, those proposed rules provided that, when we determine that a circuit court holding conflicts with that policy and the Government does not seek further review of the decision (or is unsuccessful on seeking further review), we will publish an Acquiescence Ruling describing the administrative case and the court decision, identifying the issue(s), and explaining how we will apply the holding at all levels of administrative adjudication within the circuit. The proposed rules also provided a procedure for readjudicating claims decided after the date of a circuit court decision, but before the date that we publish an Acquiescence Ruling. The proposed rules provided for the relitigation of issue(s) within a circuit when circumstances arise which bring into question whether the circuit court would reach the same conclusion on an issues(s) if the issue(s) were presented to the court again. Finally, the proposed rules defined the conditions under which we would rescind an Acquiescence Ruling as obsolete.

We received 14 comments in response to the NPRM. Seven comments were submitted by private attorneys or law school professors, and five expressed the views of legal service or claimant advocacy organizations. In addition, the Chairman of the Administrative Conference of the United States (ACUS) and its Judicial Review Committee submitted joint comments. We also received comments from the American Bar Association's Commission on the Legal Problems of the Elderly. These comments are grouped according to subject matter and discussed below.

### *Comment: Misapplication of Existing Policy*

Nine commenters suggested that we have not fully implemented our existing policy whereby we issue Acquiescence Rulings advising our adjudicators how to apply circuit court holdings which conflict with our interpretation of the Social Security Act or implementing regulations. Specifically, these commenters alleged that we have not identified all existing circuit court holdings at variance with our policy and issued Acquiescence Rulings informing adjudicators how these holdings should be applied. They also alleged that in reviewing circuit court decisions to determine whether they conflict with our policy, we read them too narrowly and thus, wrongly decide that an Acquiescence Ruling is unnecessary.

### *Response*

After we revised our policy in 1985, we reviewed approximately 800 prior circuit court decisions to identify those requiring an Acquiescence Ruling and instituted an ongoing review of all subsequent decisions of the circuit courts. Thus, we review every circuit court decision to determine whether a court's holding conflicts with our policy. As a result of these procedures, we have issued 30 Acquiescence Rulings and have a number of others under consideration.

The vast majority of adverse circuit court decisions do not conflict with our policy; they are based either on whether substantial evidence supports the Secretary's final administrative decision or on whether the final administrative decision adheres to established policy. Whether or not the holding of a particular circuit court decision "conflicts" with our policy is not always clear, and this may account for the concern expressed in some comments about the number of Acquiescence Rulings issued to date in relation to the number of court of appeals decisions we have received. In the Disability programs, for example, the courts have developed differing expressions of the rules for weighing various types of evidence or assessing subjective complaints or symptoms. Although some of these formulations differ in their wording, they are not inconsistent with our policy. In such situations, we do not believe that it is necessary to issue an Acquiescence Ruling. Rather, we may provide instructions to adjudicators to ensure that our policy is followed correctly or revise our regulations to provide more specific policy guidance on the matter at issue.

If a person believes that we have overlooked or misconstrued a holding in a court of appeals decision, that person may bring this matter to our attention and we will respond appropriately.

### *Comment: Apply Circuit Court Decisions Nationwide*

One commenter suggested that to improve national uniformity in the administration of the Social Security programs, circuit court holdings which conflict with our policy, but do not conflict with the precedent of other circuits, should be applied nationwide.

### *Response*

As a number of studies on the subject of Federal agency acquiescence have noted, nationwide adoption of the decision of the first circuit court to address an issue precludes other circuit courts from considering the issue. In 1984, when Congress was considering legislation that would have required the Social Security Administration to acquiesce in courts of appeals decisions, the Solicitor General of the United States expressed similar objections, stating that the practical effect of that legislation would be to require the Department of Justice to consider seeking Supreme Court review of the first adverse decision on an issue by any court of appeals. An approach that would require nationwide adoption of the first court of appeals decision on a particular issue would not be an improvement in national uniformity, but would rather result in the first circuit that happened to rule on an issue setting the agency's national policy on that subject. In effect, the circuit court that would rule first would rule last. This is a result that could hardly be intended by any reasonable version of acquiescence, and we have not adopted the suggestion.

*Comment: Implement Circuit Court Decision Pending Further Review*

Four commenters addressed the provision that we would not implement a circuit court holding which conflicts with our policy by issuing an Acquiescence Ruling until the Government had decided not to seek further review or had sought such review but was unsuccessful. One comment suggested that we apply circuit court holdings, whether or not we issue a ruling, until the last appellate court to which the Government might appeal reverses or vacates the circuit court decision or until a change in the law negates or modifies the holding. Another commenter noted that, at the Administrative Law Judge (ALJ) and Appeals Council levels of administrative review, staff are trained in reading and understanding judicial decisions and are capable of, and should be allowed to, consider circuit court holdings without the benefit of an Acquiescence Ruling.

*Response*

The provision of the proposed rule which these comments address was predicated on the fact that, as a party to litigation, the Government has the same right to appeal under the Federal Rules of Appellate Procedure as other litigants. The legal issue decided by a court is not settled until appeal rights are exhausted. Therefore, we do not believe it is appropriate to apply a circuit court's legal interpretation to other cases when we do not know whether the court's first interpretation will be the ultimate law of the circuit.

To address the fact that final judicial resolution of issues may take some time, the NPRM proposed a procedure for readjudicating cases decided between the time of a court decision in which we determine the holding is in conflict with our policy and the time that we publish an Acquiescence Ruling. That procedure permits claimants to have their cases readjudicated if they demonstrate that application of the Acquiescence Ruling could change our prior determination or decision on their claims. We have retained this procedure in the final regulation.

Although we agree that the legal training and experience of ALJs and members of the Appeals Council allows them to read court decisions with greater ease than other adjudicators, we have not adopted this comment. First, under this final acquiescence policy, Acquiescence Rulings apply to all levels of adjudication, not only to the ALJ and Appeals Council levels, unless a holding by its nature applies only to certain levels of adjudication. Thus, the approach suggested in this comment would create different standards of adjudication at the different levels of administrative review. Second, interpreting and applying a circuit court holding is not always a simple matter, as we noted previously. Finally, by statute, establishing policy is the Secretary's responsibility; adjudicators are responsible for applying that policy to the facts in any given case. Therefore, we believe that to ensure the uniform and consistent adjudication necessary in the administration of a national program, the agency must analyze court decisions and provide adjudicators as specific a statement as possible explaining the agency's interpretation of a court of appeals holding, as well as providing direction on how to apply the holding in the course of adjudication.

*Comment: Burden on Claimant to Demonstrate Ruling Applies*

Five commenters sought further clarification regarding the "readjudication" procedure, or objected to the burden it places on claimants. As noted in the response to the previous comments, the NPRM provided that, for claims decided after the circuit court decision but before publication of an Acquiescence Ruling in the Federal Register a claimant could request "application of the ruling to the prior determination or decision." The claimant must "demonstrate that application of the ruling could change the prior determination or decision."

One commenter argued that "it should not be the claimant's responsibility and burden" to demonstrate that the ruling applies because "[a]pplication of the Social Security Act should not be an adversarial process, and if a court decision has relevance to an application for benefits, the law and its interpretation by a court should be applied without further action by a claimant."

Finally, two commenters suggested that, after the issuance of a circuit court decision containing a holding which conflicts with our policy, we maintain a list of all cases decided after that date which might be decided differently if the court holding were considered. Once an Acquiescence Ruling is published, we should then automatically readjudicate those cases and issue new determinations or decisions.

*Response*

After we publish an Acquiescence Ruling, we will apply it to all active claims. Thus, claimants need not take any action to have Acquiescence Rulings applied to pending claims or those which they have appealed. The purpose of the readjudication procedure is to provide claimants an expeditious means to have an Acquiescence Ruling applied to their claims by the adjudicator most familiar with that claim. The readjudication procedure, therefore, allows a claimant to seek immediate application of the ruling, avoiding the necessity to appeal if a ruling could change the prior decision.

With regard to maintaining case listings, we considered such an approach, but have rejected it as unworkable. Once we receive adverse decisions, we must analyze them to determine whether or not their holdings conflict with our policy.

Often, a court's decision is directed to a procedural, rather than substantive issue, and commonly a court's holding is based on the adjudicator's failure to follow established policy, and thus, does not conflict with the policy itself.

As a matter of operational necessity, some time will always elapse between the date of a court decision and the time that we could notify all adjudicators to begin listing cases which might be affected by its holding. Thus, a substantial number of cases would not be listed for later readjudication. The process which these comments suggest presumes instantaneous, comprehensive identification of all cases, which operationally we cannot accomplish. Therefore, despite the fact that requiring claimants to seek readjudication does require some action on their part, we have concluded that this is the most efficient and effective way to proceed and have not adopted these comments in the final regulations. This result is similar to that which occurs in court. If a district court decides a case and a court of appeals later issues a more favorable rule in a different case, the district court plaintiff must petition the district court to have the more favorable rule applied to his case. Consistent with our commitment to providing the highest quality service to the public, we will, through a variety of means, inform the public about circuit court decisions which may affect their claims.

*Comment: Definition of "Demonstrate"*

Other commenters sought further definition of the term "demonstrates" that a ruling applies.

*Response*

Although the issues and factual circumstances that might be involved in any particular Acquiescence Ruling are difficult to predict, we have addressed this comment by adding the following sentence to the final regulation: "A claimant may demonstrate that the ruling applies by submitting a statement which cites the ruling and indicates what finding or statement in the rationale of the prior determination or decision conflicts with the ruling."

*Comment: Review of Conclusion not to Readjudicate*

Three commenters objected to the provision in the NPRM that "our conclusion not to readjudicate will not be subject to further administrative or judicial review." One commenter argued that this statement "is an attempt to arbitrarily limit the rights of a claimant/beneficiary under the Act, and is of questionable validity." The other comments questioned the constitutionality of denying a person the right to judicial review of our conclusion not to readjudicate.

*Response*

Under current regulations and case law, a number of administrative actions are not subject to further administrative or judicial review. For example, the courts have upheld our regulatory policy that, under most circumstances, a decision regarding whether or not a prior determination or decision may be reopened and revised is not subject to judicial review. Thus, we do not believe that the statute requires us to afford claimants the opportunity for further administrative or judicial review.

Our rationale for not permitting further appeal on the question of whether or not a ruling applies to a claim is that once we conclude that readjudication is not necessary, the next step should be appeal on the substantive merits of the claim itself, not the readjudication question. In reaching a decision on the substantive issue(s), the readjudication issue will be resolved, conserving limited administrative and judicial resources. As one commenter noted, it would be "much more reasonable * * * [to] simply provide full administrative appellate rights in these cases on the merits of the cases, rather than on the dispute about whether application of the circuit court decision would have made any difference in the case."

For persons who do not appeal timely and subsequently become aware that an Acquiescence Ruling may apply to their claim, the readjudication procedure is available. In addition, claimants may also petition to have their claims reopened, if the grounds for reopening are met. We believe that the combination of appeal, readjudication and reopening provides a fair process that protects the rights of claimants. Therefore, the readjudication procedure in the final regulation remains unchanged, except for the amendment described below. We have added the readjudication procedure to the list of actions in 20 CFR 404.903 and 416.1403 that are not initial determinations to make explicit in those sections that further administrative and judicial review is not available.

In analyzing the comments on this section of the NPRM, we noted that resolving a readjudication request might consume part or all of the claimant's appeal period (sixty days, plus five days mail time). Thus, we have added the following sentence in the final regulation to ensure that claimants who request readjudication instead of appeal do not inadvertently lose their right to appeal: "If a claimant files a request for readjudication within the sixty day appeal period and we deny that request, we shall extend the time to file an appeal on the merits of the claim to sixty days after the date that we deny the request for readjudication."

*Comment: The Constitution does not Permit Relitigation*

A number of commenters questioned whether the Constitution permits SSA (or any Government agency) to relitigate an issue within a circuit. One typical comment argued that SSA "does not have the power or discretion under the Unite[d] States Constitution to decide what decisions it will follow." On the other hand, in their joint comments on the proposed regulations, the Chairman of the Administrative Conference of the United States and its Committee on Judicial Review recognized the appropriateness of intracircuit nonacquiescence, within certain limits, and strongly supported the proposed rule as "a judicious balancing of the Agency's responsibilities to seek national uniformity in policy and program administration and to deal with claimants in a fair and minimally burdensome way."

*Response*

We recognize that intracircuit nonacquiescence is a topic about which knowledgeable individuals disagree, as the public response to our proposed regulations has shown. However, we do not believe that a Federal agency is constitutionally precluded from relitigating an issue within a circuit that has previously issued a ruling adverse to the Government's position. In *United States v. Estate of Donnelly*, 397 U.S. 286, 294–295 (1970), the Supreme Court said, "Acts of Congress are generally to be applied uniformly throughout the country from the date of their effectiveness onward. Generally, the United States, like other parties, is entitled to adhere to what it believes to be the correct interpretation of a statute, and to reap the benefits of that adherence if it proves to be correct, except where bound to the contrary by a final judgment in a particular case." In *United States v. Mendoza*, 464 U.S. 154 (1984), the Supreme Court recognized that the constraints peculiar to Government litigation, such as the amount and geographic breadth of such litigation, the nature of the issues involved, and the potential for successive administrations "properly * * * to take different positions with respect to the resolution of a particular issue," justified the adoption of a rule for Government litigation different from those applicable to private citizens. 464 U.S. at 159–163. In rejecting unanimously the argument that the Government is precluded from relitigating in one case an issue decided in a prior proceeding involving the Government and a different litigant, the *Mendoza* Court held that, although the Government was bound by the prior judgment with respect to the parties to that earlier suit, "it is not further bound in a case involving a litigant who was not a party to the earlier litigation." 464 U.S. at 162. Moreover, in recently authorizing review in *Patterson v. McClean Credit Union*, the Supreme Court stated that "it is surely no affront to settled jurisprudence to request argument on whether a particular precedent should be modified or overruled." 108 S. Ct. 1419–20.

Finally, after perhaps the most thorough examination to date of the separation of powers, due process, and equal protection arguments that have been advanced in support of an alleged constitutional bar against nonacquiescence, a study sponsored by the Administrative Conference of the United States concluded that such arguments are not persuasive. See Estreicher, S., and Revesz, R., *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 718–735 (1989). This study's rejection of a *per se* bar against intracircuit nonacquiescence lends further support to our position.

*Comment: Re-visit Issues through On-going Litigation*

One commenter suggested that the relitigation procedure in the NPRM is not necessary to raise an issue which a circuit court previously decided; rather, SSA should use on-going litigation (cases pending before the district or circuit courts) to bring the issue to the court's attention.

*Response*

We agree that using on-going litigation as a vehicle to raise issues previously decided by a court of appeals and seek further clarification of a circuit court's prior holding is an essential part of the litigation process. When the issues in on-going litigation are related to those previously decided, we will endeavor to use pending litigation rather than the relitigation process to resolve them. However, because we do not believe that all issues can be raised and resolved through pending litigation, we have retained the relitigation procedure in the final regulation.

*Comment: Activating Events for Relitigation are too Generous*

One commenter stated that the activating events which might prompt relitigation are too generous to the agency. Specifically, the commenter suggested that relitigation based on "enactment of legislation which affects a closely analogous body of law" might lead to the concept that provisions of "closely analogous programs" are the standard by which the courts would determine whether the agency's rules are arbitrary and capricious.

This commenter also suggested that the activating event concerning subsequent circuit court precedent in other circuits was too vague and asked how many subsequent decisions would be necessary and how closely aligned they must be to the circuit court decision which led to the Acquiescence Ruling. The commenter recommended that in lieu of this provision, we should support "petition[s] for certiorari" so that conflicts among the circuit courts can be resolved by the Supreme Court.

*Response*

In drafting the "activating events" for relitigation, we believe we defined them as clearly as possible, and we do not consider them overly generous to the agency. In our view, it is impossible to predict and thus define with any more precision what specific actions by the Congress, the Supreme Court, or other circuit courts might provide a sound legal basis for relitigating an issue within a circuit. Moreover, we believe that actions of Congress affecting a closely analogous body of law could be grounds for relitigation. As many of the comments suggest, and as we have noted in the NPRM and this final regulation, relitigation within a circuit would not be the primary means by which we would resolve conflicts in regulatory or statutory interpretation.

The vast majority of adverse circuit court decisions do not contain holdings which conflict with our policy; they are based either on whether substantial evidence supports the Secretary's final administrative decision or on whether the final administrative decision adheres to established policy. When circuit court holdings do conflict with our policy, we expect to resolve conflicts by actively pursuing our right to seek further review, resurfacing issues in related litigation, clarifying our regulations, or seeking amendments to the statute.

The Solicitor General determines when the Government will file a petition for *certiorari* with the Supreme Court, as well as what the Government's position may be when another party seeks *certiorari* in a case in which the Government is a party. We will continue to consult with the Department of Justice on whether to oppose another party's petition for *certiorari* to resolve conflicts among the circuits and whether to attempt to relitigate an issue in the lower courts before asking the Supreme Court to review it.

Because we believe that it is essential to preserve the Government's right to relitigate when other avenues for resolving conflicts are not available and a sound legal basis for relitigation exists, we have retained the relitigation provisions in the final regulations.

*Comment: Paying Benefits during Relitigation*

One commenter recommended that we pay benefits to claimants who would be eligible for payments under circuit court law while we relitigate an issue within a circuit.

*Response*

We do not believe we have the authority to pay benefits as this commenter suggests. In order to bring the issue in dispute before a Federal court for relitigation, we must first deny the claim of an individual which raises the issue. This is necessary because the Constitution limits the jurisdiction of Federal courts to actual cases or controversies, such as those where an individual claims benefits and we deny the claim. Our authority to pay benefits is also limited by section 205(i) of the Act to those claims where there has been a final decision of the Secretary or a court awarding benefits. Where the claim has been denied by the Secretary, as it must be where the claim is to be the vehicle for relitigation, the Act precludes us from paying benefits while the court action is pending.

The issue of benefit payments to claimants whose cases are subject to the relitigation procedure is also related to the question of how cases are selected for relitigation. In the proposed rules, we specifically requested comments on this matter, but received only one. In their joint comments, the Chairman of the Administrative Conference of the United States and its Committee on Judicial Review noted that the Conference "has not studied in any detail the question of the impact on claimants when SSA decides to relitigate an issue. Thus we do not have any specific suggestions as to how SSA might select the claims to be chosen for relitigation (other than the purely legal consideration of selecting claims in which the fact situations present the clearest and most uncluttered presentation of the relevant issues)."

Because we do not expect to relitigate very often and cannot now predict what the issue might be, the final regulations contain the same provisions as the proposed rules on this point. We will, as the Conference suggested, "explore[s] various options for ameliorating the impact of relitigation" on claimants when we decide that relitigation is appropriate.

*Comment: Relitigate Cases with Attorney Representation and Pay Attorney Fees*

One commenter suggested that, in order to increase the likelihood that claims selected for relitigation will in fact be pursued to Federal court, we should send notices announcing our intention to relitigate an issue only to persons who have attorney representation. In addition, the commenter recommended that the regulations provide that, "regardless of how the courts ultimately decide the case, SSA will pay all of the attorney's fees. In cases where the plaintiff prevails, SSA should agree to pay Equal Access to Justice Act fees without any dispute in the courts."

*Response*

The fact that the vast majority of claimants who appeal to the ALJ and Appeals Council levels of administrative review are represented provides reasonable assurance that a sufficient number of claims we select for relitigation will be pursued to Federal court. In addition, we also believe that disparate treatment on the basis of representation would raise serious questions of unequal treatment.

In regard to the payment of attorney fees, under current law, we are authorized only to pay attorney fees from Federal funds (as opposed to the payment of attorney fees from claimants' past-due benefits under section 206 of the Social Security Act) under the provisions of the Equal Access to Justice Act (EAJA). If we relitigate an issue within a circuit and the court declines to adopt our position, only a court may decide the question of whether or not a petition for EAJA fees should be granted. We will decide at that time whether or not to oppose the petition.

### *Comment: Clarify Actions after Relitigation*

One commenter suggested that we specify more clearly what actions we will take after we relitigate an issue and do not prevail, including whether we will readjudicate cases. The proposed rules stated that, in order to implement "any subsequent decision of the circuit court or Supreme Court * * * quickly and efficiently," we would "maintain a listing of all claimants" who receive a notice indicating our intent to relitigate.

### *Response*

We have added language to the end of this provision so that it now reads, "we will maintain a listing of all claimants who receive this notice and will provide them with the relief ordered by the court." Because the court might provide relief other than readjudication, we have not attempted to identify all possible forms that relief might take.

### *Comment: Do not Revoke the 1970 APA Waiver Statement*

A number of commenters addressed our statement in the Preamble to the NPRM that we regard "Acquiescence Rulings and related Federal Register notices as interpretative rules which would be exempt from the notice of proposed rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. 553(b). If this view is made subject to legal challenge, the Department will not apply the policy statement it issued in 1970 as regards the public's participation in rulemaking with respect to the Ruling or notice at issue." Some commenters interpreted this statement to be an attempt to withdraw the 1970 waiver and objected to both the withdrawal and the use of a Preamble as the vehicle to withdraw the statement.

### *Response*

We did not intend this statement to withdraw or revoke in any way the Department's 1970 policy statement. Rather, we included this statement in the Preamble of the NPRM to advise the public that we consider Acquiescence Rulings and related Federal Register notices announcing adoption or rescission of an Acquiescence Ruling or a decision to relitigate to be interpretative rules not subject to notice and public comment under the APA.

### *Comment: Effective Date of Acquiescence Rulings*

Two commenters noted that the NPRM provided that Acquiescence Rulings would generally be effective on the date of publication in the Federal Register and suggested that they should be effective as of the date of the circuit court decision.

### *Response*

By stating that Acquiescence Rulings would generally be "effective" on the date of publication, we meant that adjudicators would begin to apply the Acquiescence Ruling to pending claims on the date that the ruling is published.

Ordinarily this will mean that we will apply the ruling to the full pending claim even if the claim covers a time period prior to the date of the court's decision. For claims that were decided after the date of the court's decision, but before publication of the ruling, our readjudication procedure provides an opportunity for claimants, in effect, to request that the ruling be made effective as of the date of the court's decision with respect to their claims. As discussed above, we believe that this is a reasonable procedure, given the practical impossibility of implementing immediately any circuit court holding.

### **The Final Regulations**

In addition to the changes based on the comments discussed above, we have made minor technical changes for clarification and consistency. These final regulations provide that we will apply a United States Court of Appeals holding that we determine conflicts with SSA policy unless the Government seeks further review of the decision. We generally will not issue an Acquiescence Ruling for a particular decision until the Government has timely exhausted all avenues of judicial review or has decided to refrain from pursuing further judicial review in the particular case.

When the Government does not seek further review, or is unsuccessful on further review, we will publish a Social Security Acquiescence Ruling and we will apply the circuit court holding at all levels of administrative adjudication within the applicable circuit to all claims presenting the issue(s) addressed in the ruling unless the holding by its nature applies only to certain levels of adjudication. The ruling will describe the administrative case and the court decision, identify the issue(s) considered, and explain how we will apply the holding within the applicable circuit, including, as necessary, how the holding relates to other decisions within the circuit.

We will publish all rulings, including Social Security Acquiescence Rulings as well as all other rulings, in the Federal Register. In the past, Social Security Rulings and Social Security Acquiescence Rulings have been published singly and in cumulative annual editions, but only summaries of Social Security Acquiescence Rulings have appeared in the Federal Register. All rulings will also be published for sale by the Government Printing Office and made available at district and branch offices as well as the field offices of the Office of Hearings and Appeals. Generally, the rulings will be effective on the date of publication in the Federal Register and will be applied to all active claims that raise the issue(s) addressed in the ruling.

If we make a determination or decision on a claim after the date of a circuit court decision, but before we publish an Acquiescence Ruling, and after the publication of the ruling, the claimant requests application of the ruling to the prior determination or decision and can demonstrate that application of the ruling could change the prior determination or decision, we will readjudicate the claim at the same level it was last adjudicated in accordance with the requirements of the ruling. The readjudication in this circumstance will be limited to consideration of the issue(s) addressed by the ruling. Any new determination or decision on readjudication will be subject to administrative and judicial review in accordance with our regulations. Our denial of a request for readjudication will not be subject to further administrative or judicial review.

Although we will apply a circuit court holding which conflicts with our interpretation of the Social Security Act or regulations, circumstances may arise which bring into question whether the circuit court would reach the same conclusion as it did in its prior decision if the issue(s) were relitigated within the circuit. Accordingly, the regulations also establish a process for the relitigation of issues whereby we may apply our interpretation of the Social Security Act or regulations in the future administrative adjudication of claims.

The first step in the relitigation process requires the occurrence of an activating event which raises the question of whether the circuit court would reach the same conclusion if the issue(s) previously decided were presented to it again. In general, these activating events include:

1. An action by both Houses of Congress that indicates that a court case on which an Acquiescence Ruling was based was decided inconsistently with congressional intent, such as may be expressed in a joint resolution, an appropriations restriction, or enactment of legislation which affects a closely analogous body of law; or

2. A statement in a majority opinion of the same circuit that indicates the court might no longer follow its previous holding if a particular issue were presented again; or

3. Subsequent circuit court precedent in other circuits that supports our interpretation of the Social Security Act or regulations on the issue(s) in question; or

4. A subsequent Supreme Court decision that presents a reasonable legal basis for questioning a circuit court holding on which we based a Social Security Acquiescence Ruling.

The second step in the relitigation process requires that the General Counsel of the Department of Health and Human Services, after consulting with the Department of Justice, concur that relitigation of an issue and application of our interpretation of the Social Security Act or regulations at the administrative level within the circuit would be appropriate.

The third step in the relitigation process requires publication of a notice in the Federal Register that we will apply our interpretation of the Social Security Act or regulations as to the issue that was the subject of the Acquiescence Ruling at the administrative level within the circuit. The notice will explain why we made this decision. We will continue the policy of applying our interpretation of the Act or regulations in order to relitigate an issue.

After we have published a notice in the Federal Register of our intent to relitigate an issue that is the subject of an Acquiescence Ruling, we will take steps to expedite administrative and judicial review and resolution of the issue in question and ensure that we are able to comply with any subsequent circuit court of Supreme Court decision. First, any claimant in the appropriate circuit whose claim is made subject to the relitigation procedure established in this regulation will receive a separate notice with the determination or decision on the claim. That notice will explain the difference(s) in policy between the Acquiescence Ruling and our interpretation of the Social Security Act or regulations and inform the claimant that the agency is seeking to relitigate the issue in the circuit. Claims not subject to relitigation will continue to be decided in accordance with the circuit standard contained in the Acquiescence ruling. Second, the agency will maintain a listing of all claimants who receive such notices so that any subsequent decision of the circuit court or the Supreme Court can be implemented quickly and efficiently.

We will attempt to maintain national uniformity in the administration of our programs by seeking Supreme Court review of holdings in adverse circuit court decisions which have a major impact on program administration, by clarifying our regulations when their ambiguity has resulted in a circuit court holding interpreting them differently from the way we intended them to be interpreted, by issuing a new regulation(s) if a circuit court holding concerns an issue(s) which the current regulations do not address, and by seeking corrective legislation from the Congress. Accordingly, we will rescind as obsolete a Social Security Acquiescence Ruling when: the Supreme Court overrules or limits a circuit court holding on an issue that was the basis of an Acquiescence Ruling; a circuit court overrules or limits its prior holding on an issue that was the basis of an Acquiescence Ruling; a Federal law is enacted that removes the basis for the holding of a circuit court that was the subject of an Acquiescence Ruling; or we subsequently clarify, modify or revoke a regulation or ruling that was the subject of a circuit court holding that conflicts with our interpretation of the Social Security Act or regulations. We will also rescind as obsolete a Social Security Acquiescence Ruling when we subsequently publish a new regulation(s) addressing an issue(s) not previously included in our regulations when that issue was the subject of a circuit court holding that conflicted with our interpretation of the Social Security Act or regulations and that holding is not one which was compelled by the statute or the Constitution.

We are adopting the acquiescence policy set forth in this final rule not because we believe that this policy, or any acquiescence policy, is legally compelled. Rather, we are adopting this acquiescence policy under the Secretary's discretionary authority. The standards that will be applied in determining whether to acquiesce are for internal purposes and are neither intended to nor will create any privately enforceable rights. The manner in which we will respond to an adverse court of appeals holding is matter committed to our discretion in the first instance and may involve the balancing of competing policy considerations. The policy we are adopting, which reflects our judgment regarding the appropriate response to adverse court of appeals holdings, is an appropriate exercise of our responsibility to administer the vast and complex Social Security benefit programs in a manner that is least burdensome to Social Security claimants and preserves our ability to attempt to maintain national uniformity in program administration.

## Cases Affected

The procedures set forth in these regulations apply to cases under titles II and XVI of the Social Security Act and under title IV, part B of the Federal Mine Safety and Health Act of 1977.

## Regulatory Procedures

### *Executive Order 12291*

The Secretary has determined that this is not a major rule under Executive Order 12291 because it will not have an annual effect on the economy of 100 million dollars or more, or otherwise meet the threshold criteria. Therefore, a regulatory impact analysis is not required.

### *Regulatory Flexibility Act*

We certify that these regulations will not have a significant economic impact on a substantial number of small entities because these rules will only affect individuals. Therefore, a regulatory flexibility analysis as provided in Public Law 96–354, the Regulatory Flexibility Act, is not required.

### *Paperwork Reduction Act*

These regulations impose no new reporting or recordkeeping requirements requiring Office of Management and Budget clearance.

(Catalog of Federal Domestic Assistance Program Nos. 13.802 Social Security—Disability Insurance; 13.803 Social Security—Retirement Insurance; 13.804 Social Security—Survivors Insurance; 13.807 Supplemental Security Income)

## List of Subjects

### *20 CFR Part 404*

Administrative practice and procedure; Death benefits; Disability benefits; Old-Age, Survivors and disability insurance.

### *20 CFR Part 410*

Administrative practice and procedure; Black lung benefits; Death benefits; Disability benefits; Miners.

### *20 CFR Part 416*

Administrative practice and procedure; Aged; Blind; Disability benefits; Public assistance programs; Supplemental security income (SSI).

*20 CFR Part 422*

Freedom of information; Administrative practice and procedure; organization and functions (Government agencies); Social security.

Dated: January 4, 1990.

Gwendolyn S. King,

*Commissioner of Social Security.*

Approved: January 4, 1990.

Louis W. Sullivan,

*Secretary of Health and Human Services.*

For the reasons set forth in the preamble, parts 404, 410, 416, and 422 of 20 CFR are amended as follows:

## PART 404—[AMENDED]

1. The authority citation for subpart J of part 404 continues to read as follows:

Authority: Secs. 201(j), 205 (a), (b), and (d)–(h), 221(d), and 1102 of the Social Security Act; 42 U.S.C. 401(j), 405 (a)–(b), and (d)–(h), 421(d), and 1302; sec. 5 of Pub. L. 97–455, 96 Stat. 2500; sec. 6 of Pub. L. 98–460, 98 Stat. 1802.

2. Section 404.903 is amended by adding new paragraph (o) to read as follows:

### § 404.903 Administrative actions that are not initial determinations.

* * * * *

(o) Denying your request to readjudicate your claim and apply an Acquiescence Ruling.

3. New § 404.985 is added to read as follows:

### § 404.985 Application of circuit court law.

The procedures which follow apply to administrative determinations or decisions on claims involving the application of circuit court law.

(a) We will apply a holding in a United States Court of Appeals decision which we determine conflicts with our interpretation of a provision of the Social Security Act or regulations unless the Government seeks further review of that decision or we relitigate the issue presented in the decision in accordance with paragraphs (c) and (d) of this section. We will apply the holding to claims at all levels of administrative adjudication within the applicable circuit unless the holding, by its nature, applies only at certain levels of adjudication.

(b) When we determine that a United States Court of Appeals holding conflicts with our interpretation of a provision of the Social Security Act or regulations and the Government does not seek further review or is unsuccessful on further review, we will issue a Social Security Acquiescence Ruling that describes the administrative case and the court decision, identifies the issue(s) involved, and explains how we will apply the holding, including, as necessary, how the holding relates to other decisions within the applicable circuit. These rulings will generally be effective on the date of their publication in the Federal Register and will apply to all determinations and decisions made on or after that date. If we make a determination or decision between the date of a circuit court decision and the date we publish an Acquiescence Ruling, the claimant may request application of the published ruling to the prior determination or decision. The claimant must first demonstrate that application of the ruling could change the prior determination or decision. A claimant may so demonstrate by submitting a statement which cites the ruling and indicates what finding or statement in the rationale of the prior determination or decision conflicts with the ruling. If the claimant can so demonstrate, we will readjudicate the claim at the level at which it was last adjudicated in accordance with the ruling. Any readjudication will be limited to consideration of the issue(s) covered by the ruling and any new determination or decision on readjudication will be subject to administrative and judicial review in accordance with this subpart. Our denial of a request for readjudication will not be subject to further administrative or judicial review. If a claimant files a request for readjudication within the sixty-day appeal period and we deny that request, we shall extend the time to file an appeal on the merits of the claim to sixty days after the date that we deny the request for readjudication.

(c) After we have published a Social Security Acquiescence Ruling to reflect a holding of a United States Court of Appeals on an issue, we may decide under certain conditions to relitigate that issue within the same circuit. We will relitigate only when the conditions specified in paragraphs (c) (2) and (3) of this section are met, and, in general, one of the events specified in paragraph (c)(1) of this secton occurs.

(1) Activating events: (i) An action by both Houses of Congress indicates that a court case on which an Acquiescence Ruling was based was decided inconsistently with congressional intent, such as may be expressed in a joint resolution, an appropriations restriction, or enactment of legislation which affects a closely analogous body of law;

(ii) A statement in a majority opinion of the same circuit indicates that the court might no longer follow its previous decision if a particular issue were presented again;

(iii) Subsequent circuit court precedent in other circuits supports our interpretation of the Social Security Act or regulations on the issue(s) in question; or

(iv) A subsequent Supreme Court decision presents a reasonable legal basis for questioning a circuit court holding upon which we base a Social Security Acquiescence Ruling.

(2) The General Counsel of the Department of Health and Human Services, after consulting with the Department of Justice, concurs that relitigation of an issue and application of our interpretation of the Social Security Act or regulations at the administrative level within the circuit would be appropriate.

(3) We publish a notice in the Federal Register that we intend to relitigate an Acquiescence Ruling issue and that we will apply our interpretation of the Social Security Act or regulations at the administrative level within the circuit to claims selected for relitigation. The notice will explain why we made this decision.

(d) When we decide to relitigate an issue, we will provide a notice explaining our action to all affected claimants. In adjudicating claims subject to relitigation, decisionmakers throughout the SSA administrative review process will apply our interpretation of the Social Security Act and regulations, but will also state in written determinations or decisions how the claims would have been decided under the circuit standard. Claims not subject to relitigation will continue to be decided under the Acquiescence Ruling in accordance with the circuit standard. So that affected claimants can be readily identified and any subsequent decision of the circuit court or the Supreme Court can be implemented quickly and efficiently, we will maintain a listing of all claimants who receive this notice and will provide them with the relief ordered by the court.

(e) We will rescind as obsolete a Social Security Acquiescence Ruling and apply our interpretation of the Social Security Act or regulations by publishing a notice in the Federal Register when any of the following events occurs:

(1) The Supreme Court overrule or limits a circuit court holding that was the basis of an Acquiescence Ruling;

(2) A circuit court overrules or limits itself on an issue that was the basis of an Acquiescence Ruling;

(3) A Federal law is enacted that removes the basis for the holding in a decision of a circuit court that was the subject of an Acquiescence Ruling; or

(4) We subsequently clarify, modify or revoke the regulation or ruling that was the subject of circuit court holding that we determined conflicts with our interpretation of the Social Security Act or regulations, or we subsequently publish a new regulation(s) addressing an issue(s) not previously included in our regulations when that issue(s) was the subject of a circuit court holding that conflicted with our interpretation of the Social Security Act or regulations and that holding was not compelled by the statute or Constitution.

## PART 410—[AMENDED]

4. The authority citation for subpart F of part 410 is revised to read as follows:

Authority: Secs. 413(b), 426(a), 507, and 508 of the Federal Mine Safety and Health Act of 1977; 30 U.S.C. 923(b), 936(a), 956, and 957.

5. Section 410.615 is amended by adding new paragraph (j) to read as follows:

### § 410.615 Administrative actions that are not initial determinations.

* * * * *

(j) The denial by the Administration of a request to readjudicate a claim and apply an Acquiescence Ruling.

6. New § 410.670c is added to read as follows:

### § 410.670c Application of circuit court law.

The procedures which follow apply to administrative determinations or decisions on claims involving the application of circuit court law.

(a) The Administration will apply a holding in a United States Court of Appeals decision which it determines conflicts with its interpretation of a provision of the Social Security Act or regulations unless the Government seeks further review or the Administration relitigates the issue presented in the decision in accordance with paragraphs (c) and (d) of this section. The Administration will apply the holding to claims at all levels of administrative adjudication within the applicable circuit unless the holding, by its nature, applies only at certain levels of adjudication.

(b) When the Administration determines that a United States Court of Appeals holding conflicts with the Administration's interpretation of a provision of the Social Security Act or regulations and the Government does not seek further review or is unsuccessful on further review, the Administration will issue a Social Security Acquiescence Ruling that describes the administrative case and the court decision, identifies the issue(s) involved, and explains how the Administration will apply the holding, including, as necessary, how the holding relates to other decisions within the applicable circuit. These rulings will generally be effective on the date of their publication in the Federal Register and will apply to all determinations and decisions made on or after that date. If the Administration makes a determination or decision between the date of a circuit court decision and the date an Acquiescence Ruling is published, the claimant may request application of the published ruling to the prior determination or decision. The claimant must first demonstrate that application of the ruling could change the prior determination or decision. A claimant may so demonstrate by submitting a statement which cites the ruling and indicates what finding or statement in the rationale of the prior determination or decision conflicts with the ruling. If the claimant can so demonstrate, the Administration will readjudicate the claim at the level at which it was last adjudicated in accordance with the ruling. Any readjudication will be limited to consideration of the issue(s) covered by the ruling and any new determination or decision on readjudication will be subject to administrative and judicial review in accordance with this subpart. A denial of a request for readjudication will not be subject to further administrative or judicial review. If a claimant files a request for readjudication within the sixty day appeal period and that request is denied, the Administration shall extend the time to file an appeal on the merits of the claim to sixty days after the date that the request for readjudication is denied.

(c) After the Administration has published a Social Security Acquiescence Ruling to reflect a holding of a United States Court of Appeals on an issue, the Administration may decide under certain conditions to relitigate that issue within the same circuit. The Administration will relitigate only when the conditions specified in paragraphs (c) (2) and (3) of this section are met, and, in general, one of the events specified in paragraph (c)(1) of this section occurs.

(1) Activating events: (i) An action by both Houses of Congress indicates that a court case on which an Acquiescence Ruling was based was decided inconsistently with congressional intent, such as may be expressed in a joint resolution, an appropriations restriction, or enactment of legislation which affects a closely analogous body of law;

(ii) A statement in a majority opinion of the same circuit indicates that the court might no longer follow its previous decision if a particular issue were presented again;

(iii) Subsequent circuit court precedent in other circuits supports the Administration's interpretation of the Social Security Act or regulations on the issue(s) in question; or

(iv) A subsequent Supreme Court decision presents a reasonable legal basis for questioning a circuit court holding upon which the Administration bases a Social Security Acquiescence Ruling.

(2) The General Counsel of the Department of Health and Human Services, after consulting with the Department of Justice, concurs that relitigation of an issue and application of the Administration's interpretation of the Social Security Act or regulations at the administrative level within the circuit would be appropriate.

(3) The Administration publishes a notice in the Federal Register that it intends to relitigate an issue, and that it will apply its interpretation of the Social Security Act or regulations at the administrative level within the circuit. The notice will explain why the Administration made this decision.

(d) When the Administration decides to relitigate an issue, it will provide a notice explaining its action to all affected claimants. In adjudicating claims subject to relitigation, decisionmakers throughout the SSA administrative review process will apply the Administration's interpretation of the Social Security Act and regulations, but will also state in written determinations or decisions how the claims would have been decided under the circuit standard. Claims not subject to relitigation will continue to be decided under the Acquiescence Ruling in accordance with the circuit standard. So that affected claimants can be readily identified and any subsequent decision of the circuit court or the Supreme Court can be implemented quickly and efficiently, the Administration will maintain a listing of all claimants who receive this notice and will provide them the relief ordered by the court.

(e) The Administration will rescind as obsolete a Social Security Acquiescence Ruling and apply its interpretation of the Social Security Act or regulations by publishing a notice in the Federal Register when any of the following events occurs:

(1) The Supreme Court overrules or limits a circuit court holding that was the basis of an Acquiescence Ruling;

(2) A circuit court overrules or limits itself on an issue that was the basis of an Acquiescence Ruling;

(3) A Federal law is enacted that removes the basis for the holding in a decision of a circuit court that was the subject of an Acquiescence Ruling; or

(4) The Administration subsequently clarifies, modifies or revokes the regulation or ruling that was the subject of a circuit court holding that the Administration determined conflicts with its interpretation of the Social Security Act or regulations, or it subsequently publishes a new regulation(s) addressing an issue(s) not previously included in its regulations when that issue(s) was the subject of a circuit court holding that conflicted with its interpretation of the Social Security Act or regulations and that holding was not compelled by the statute or Constitution.

## PART 416—[AMENDED]

7. The authority citation for subpart N of part 416 continues to read as follows:

Authority: Secs. 1102, 1631, and 1633 of the Social Security Act; 42 U.S.C. 1302, 1383, and 1383b; sec. 6 of Pub. L. 98-460, 98 Stat. 1802.

8. Section 416.1403 is amended by adding new paragraph (a)(10) to read as follows:

### § 416.1403 Administrative actions that are not initial determinations.

(a) * * *

(10) Denying your request to readjudicate your claim and apply an Acquiescence Ruling.

* * * * *

9. New § 416.1485 is added to read as follows:

### § 416.1485 Application of circuit court law.

The procedures which follow apply to administrative determinations or decisions on claims involving the application of circuit court law.

(a) We will apply a holding in a United States Court of Appeals decision which we determine conflicts with our interpretation of a provision of the Social Security Act or regulations unless the Government seeks further review of that decision or we relitigate the issue presented in the decision in accordance with paragraphs (c) and (d) of this section. We will apply the holding to claims at all levels of administrative adjudication within the applicable circuit unless the holding, by its nature, applies only at certain levels of adjudication.

(b) When we determine that a United States Court of Appeals holding conflicts with our interpretation of a provision of the Social Security Act or regulations and the Government does not seek further review or is unsuccessful on further review, we will issue a Social Security Acquiescence Ruling that describes the administrative case and the court decision, identifies the issue(s) involved, and explains how we will apply the holding, including, as necessary, how the holding relates to other decisions within the applicable circuit. These rulings will generally be effective on the date of their publication in the Federal Register and will apply to all determinations, redeterminations or decisions made on or after that date. If we make a determination or decision between the date of a circuit court decision, and the date we publish an Acquiescence Ruling, the claimant may request application of the published ruling to the prior determination or decision. The claimant must first demonstrate that application of the ruling could change the prior determination or decision. A claimant may so demonstrate by submitting a statement which cites the ruling and indicates what finding or statement in the rationale of the prior determination or decision conflicts with the ruling. If the claimant can so demonstrate, we will readjudicate the claim at the level at which it was last adjudicated in accordance with the ruling. Any readjudication will be limited to consideration of the issue(s) covered by the ruling and any new determination or decision on readjudication will be subject to administrative and judicial review in accordance with this subpart. Our denial of a request for readjudication will not be subject to further administrative or judicial review. If a claimant files a request for readjudication within the sixty day appeal period and we deny that request, we shall extend the time to file an appeal on the merits of the claim to sixty days after the date that we deny the request for readjudication.

(c) After we have published a Social Security Acquiescence Ruling to reflect a holding of a United States Court of Appeals on an issue, we may decide under certain conditions to relitigate that issue within the same circuit. We will relitigate only when the conditions specified in paragraphs (c) (2) and (3) of this section are met, and, in general, one of the events specified in paragraph (c)(1) of this section occurs.

(1) Activating events: (i) An action by both Houses of Congress indicates that a court case on which an Acquiescence Ruling was based was decided inconsistently with congressional intent, such as may be expressed in a joint resolution, an appropriations restriction, or enactment of legislation which affects a closely analogous body of law;

(ii) A statement in a majority opinion of the same circuit indicates that the court might no longer follow its previous decision if a particular issue were presented again;

(iii) Subsequent circuit court precedent in other circuits supports our interpretation of the Social Security Act or regulations on the issue(s) in question; or

(iv) A subsequent Supreme Court decision presents a reasonable legal basis for questioning a circuit court holding upon which we base a Social Security Acquiescence Ruling.

(2) The General Counsel of the Department of Health and Human Services, after consulting with the Department of Justice, concurs that relitigation of an issue and application of our interpretation of the Social Security Act or regulations at the administrative level within the circuit would be appropriate.

(3) We publish a notice in the Federal Register that we intend to relitigate an Acquiescence Ruling issue, and that we will apply our interpretation of the Social Security Act or regulations at the administrative level within the circuit. The notice will explain why we made this decision.

(d) When we decide to relitigate an issue, we will provide a notice explaining our action to all affected claimants. In adjudicating claims subject to relitigation, decisionmakers throughout the SSA administrative review process will apply our interpretation of the Social Security Act and regulations, but will also state in written determinations or decisions how the claims would have been decided under the circuit standard. Claims not subject to relitigation will continue to be decided under the Acquiescence Ruling in accordance with the circuit standard. So that affected claimants can be readily identified and any subsequent decision of the circuit court or the Supreme Court can be implemented quickly and efficiently, we will maintain a listing of all claimants who receive this notice and will provide them with the relief ordered by the court.

(e) We will rescind as obsolete a Social Security Acquiescence Ruling and apply our interpretation of the Social Security Act or regulations by publishing a notice in the Federal Register when any of the following events occurs:

(1) The Supreme Court overrules or limits a circuit court holding on an issue that was the basis of an Acquiescence Ruling;

(2) A circuit court overrules or limits itself on an issue that was the basis of an Acquiescence Ruling;

(3) A Federal law is enacted that removes the basis for the holding in a decision of a circuit court that was the subject of an Acquiescence Ruling; or

(4) We subsequently clarify, modify or revoke the regulation or ruling that was the subject of circuit court holding that we determined conflicts with our interpretation of the Social Security Act or regulations, or we subsequently publish a new regulation(s) addressing an issue(s) not previously included in our regulations when that issue(s) was the subject of a circuit court holding that conflicted with our interpretation of the Social Security Act or regulations and that holding was not compelled by the statute or Constitution.

## PART 422—[AMENDED]

10. The authority citation for subpart E of part 422 is revised to read as follows:

Authority: Secs. 205, 1102, 1106, and 1871 of the Social Security Act, 42 U.S.C. 405, 1302, 1306, and 1395hh; Section 413(b) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 923(b); 8 U.S.C. 1360; 26 U.S.C. 6103; 5 U.S.C. 552 and 552a.

11. Section 422.406 is amended by redesignating paragraph (b) as paragraph (c) and adding a new paragraph (b) to read as follows:

### § 422.406 Publication.

* * * * *

(b) *Publication of rulings*. Although not required pursuant to 5 U.S.C. 552 (a)(1) and (a)(2), the following rulings will be published in the Federal Register as well as by other forms of publication:

(1) Social Security Rulings are published in the Federal Register under the authority of the Commissioner of Social Security and are binding on all components of the Administration. These rulings represent precedent final opinions and orders and statements of policy and interpretations that have been adopted by the Administration.

(2) Social Security Acquiescence Rulings are published in the Federal Register under the authority of the Commissioner of Social Security and are binding on all components of the Administration, except with respect to claims subject to the relitigation procedures established in §§ 404.984 (c) and (d), 410.610c (c) and (d), and 416.1484 (c) and (d). For a description of Social Security Acquiescence Rulings, see §§ 404.984(b), 410.610c(b), and 416.1484(b) of this title.

* * * * *

### § 422.408 Statements of policy and interpretations not published in the Federal Register [Removed]

12. Section 422.408 is removed.

13. Section 422.410 is amended by adding new paragraph (l) to read as follows:

### § 422.410 Publications for sale.

* * * * *

(l) Social Security Acquiescence Rulings.

### § 422.416 [Amended]

14. Section 422.416 Availability of Records is amended by adding an "and" between the words "policy" and "other" and by removing ", such as Social Security Rulings," in paragraph (a).

15. Section 422.430 is amended by adding a new paragraph (a)(6) to read as follows:

### § 422.430 Materials available at district offices and branch offices.

(a) * * *

(6) Social Security Acquiescence Rulings.

* * * * *

16. Section 422.432 is amended by adding a new paragraph (a)(7) to read as follows:

### § 422.432 Materials in field offices of the Office of Hearings and Appeals.

(a) * * *

(7) Social Security Acquiescence Rulings.

* * * * *

[FR Doc. 90-735 Filed 1-10-90; 8:45 am]

BILLING CODE 4190-11-M

---

## DEPARTMENT OF THE TREASURY

## 31 CFR Part 103

## Amendment to the Bank Secrecy Act Regulations Regarding Administrative Rulings

**AGENCY:** Departmental Offices, Treasury.

**ACTION:** Final rule.

**SUMMARY:** Treasury is revising the Appendix to 31 CFR part 103 to list a new administrative ruling. Copies of administrative rulings may be obtained by contacting the Office of Financial Enforcement, Office of the Assistant Secretary (Enforcement).

**DATE:** Bank Secrecy Act Administrative Ruling 89-5 was effective December 21, 1989.

**ADDRESS:** Office of Financial Enforcement, Office of the Assistant Secretary (Enforcement), Department of the Treasury, room 4320, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

**FOR FURTHER INFORMATION CONTACT:** Amy G. Rudnick, Director, Office of Financial Enforcement, Office of the Assistant Secretary (Enforcement), Department of the Treasury, room 4320, 1500 Pennsylvania Avenue NW., Washington, DC 20220, 202-566-8022.

**SUPPLEMENTARY INFORMATION:** The Bank Secrecy Act, Public Law 91-508 (codified at 12 U.S.C. 1730d, 1829b, 1951-1959, and 31 U.S.C. 5311-5326), authorizes the Secretary of the Treasury to require financial institutions to keep records and file reports that the Secretary determines have a high degree of usefulness in criminal, tax, or regulatory matters. The regulations implementing the Bank Secrecy Act are at part 103 of title 31 of the Code of Federal Regulations. On September 22, 1987, Treasury issued final regulations implementing an administrative ruling system for interpretations of the Bank Secrecy Act. 52 FR 35545. Administrative rulings are published in the appendix to part 103. The administrative rulings are effective when signed. Publication in the Federal Register is merely a method of publicizing their existence.

One ruling is being added to the Appendix by this Final Rule. Bank Secrecy Act Administrative Ruling 89-5 deals with a financial institution's responsibility to provide identifying information about the person on whose behalf a transaction is conducted in Part II of the Currency Transaction Report (Form 4789).

Copies of rulings may be obtained by contacting the Office of Financial Enforcement at the address listed above. Please make all requests for rulings in writing, specifying the relevant number or subject of the ruling.

### Applicability of Notice and Effective Date Requirements

This amendment merely revises the appendix to add the text of an issued administrative ruling that interprets the Bank Secrecy Act regulations. The regulations in part 103 are not amended in any way. Therefore, for good cause found, pursuant to 5 U.S.C. 553 (b) and (d), notice and public procedure thereon and a delayed effective date are unnecessary.

### Executive Order 12291

As this final rule promulgates a regulation dealing solely with issues of agency management and organization, compliance with Executive Order 12291

## PREPARED STATEMENT OF ROSE SEAMAN

Good morning Senator Metzenbaum. Thank you for the opportunity to present this statement for the very important hearing you are conducting in Cleveland, Ohio addressing Social Security issues.

My name is Rose Seaman and I am a representative of the AFGE National Council of Social Security Administration Field Operations Locals. We represent over 30,000 Social Security employees nationwide including the workers in over 50 offices in the State of Ohio. I have been a Claims Representative since 1981 and an employee of the Social Security Administration since 1974.

The Field Office employees we represent believe the American worker has earned the right to be treated with respect and dignity. He/She does not deserve to be treated like a number even though it is a Social Security number. The Field Office employees we represent are deeply concerned because the staff cuts of 30 to 50 percent in some of our offices over the last five years have crippled our ability to provide service to the American public. The staff cuts started in 1984. To give you some idea of the reductions that continued between 1986 and 1988, Cleveland Downtown went from 46 employees to 32 employees; Akron from 45 to 32; Cleveland Southwest from 25 to 16 and Cleveland West from 35 to 26.

In an AFGE nationwide survey, 87% of the employees said there is not enough staff to adequately serve the public. The public's satisfaction with the overall quality of service dropped almost 10% in one year according to an August 1989 Office of Inspector General Report. The result of almost 1 billion dollars computer system and programs is reduced staff and reduced service.

Before the staff cuts, we had a few minutes at the end of the interview procedure when we could take the time to give the claimant our names and phone numbers. We had the time to explain the worker's rights and responsibilities, and answer any questions. Most importantly during those few minutes, a relationship of trust and reliability was established between the Social Security representative and the worker. This relationship in the long run saved time and money for the agency and delays, overpayments and grief for the claimant. The Social Security representative had the satisfaction of a job well done.

Now, we take short cuts when we close the interview. We no longer have a few minutes to explain rights or answer questions. We hand the worker a piece of paper with telephone numbers to call and written rights and responsibilities and tell them everything will be explained in the award certificate when they receive it and if there are any questions after they receive the award certificate, just call the 800 number.

When we had sufficient staff to provide service, a trained experienced social security representative completed disability reports which are complex, technical 6 page reports detailing the nature of the illness, education, medical history and work related information that serves as a source document for disability decisions. Now, the public completes the reports. We have no idea how many disabled individuals lost benefits because they were overwhelmed or unable to complete the report. Many people who complete applications by telephone do not return them for the same reason. Members of the public unfamiliar with government forms or the barely literate may omit information essential to establish their disability and will be denied benefits. We do not review the accuracy of a disability case where benefits are denied, only cases that are approved.

Our efforts to provide service is judged for the most part by statistics of categories selected to make it appear that all is well. However, unnoticed and unpublicized for example are hundreds of Continuing Disability Review cases on both medical and work issues that should have been reviewed 2 or 3 years ago. These cases are filed away in field offices because employees do not have time to work on them and because of the limited number that can be sent to State Agency. The cases can only be sent to the Disability Determination Service in Columbus for review on a weekly quota basis usually between 3 to 10 a week. This is not service, it causes a severe hardship on the disabled and a real drain on the trust fund.

In an AFGE nationwide survey, 69% of the employees would not recommend Social Security to their friends as a good place to work. Over 77% said they believed the overall morale of their co-workers was "poor" or "extremely poor" and over 43% said they were looking for a new job outside Social Security. The reason for this low morale is apparent. Staff reductions directly impact on our ability to provide service. Public satisfaction with overall quality of service dropped almost 10% according to the Office of Inspector General Report in August 1989.

The staff reductions have led to problems in the failure to post earnings, hearings and appeals backlogs, disability applications being completed by the public, SSI redeterminations, and terminations, inaccurate information, employee burnout and low morale.

The employees we represent believe Social Security is a social contract of trust between the American worker and the government that has lasted over 55 years. We believe the American worker by paying the Social Security tax, conserved funds for his/her retirement, disability or in the case of death, to ensure benefits for his/her survivors. A program as important as Social Security cannot afford to lose the confidence and trust of the American public.

We urge you support a statutory staffing floor of 72,675 workyears in the 1991 budget appropriations. The Social Security Administration was once the symbol of competence, quality and service to the American public by which all other government agencies were judged. With the support of Congress, we can once again focus on our mission of quality service.

Thank you

**REHABILITATION SERVICES COMMISSION**

Bureau of Disability Determination
P.O. Box 359001 Columbus, Ohio 43235-9001 (614) 438- 1500

February 22, 1990

The Honorable Howard M. Metzenbaum
United States Senate
Committee on Labor and Human Resources
Washington, DC 205 10-6300

Attn: Margaret Thale,
Legislative Assistant

Dear Sir:

Enclosed are responses to the additional questions sent to me in connection with the hearing on the Social Security disability benefit process. If you have further questions regarding this issue, I would be happy to respond further.

Thank you for the opportunity to participate in this process.

Yours very truly,

Leonard F. Herman, Director
Bureau of Disability Determination

LFH/ms

Enclosure

**SOCIAL SECURITY DISABILITY — SUPPLEMENTAL SECURITY INCOME**

QUESTION 1.

You note that your office is processing initial disability claims in an average of 65.8 days -- just ahead of the national average. You're aware, I'm sure, that many people believe this is still too long. And it's a good 15 to 20 days longer than time needed before 1984. What would you say is the greatest single factor in that delay?

The greatest single factor which has lead to the increase in the time required to process initial disability claims since 1984 is the multitude of program changes that have been implemented. Most significant among these were the 12 month medical evidence requirements, residual functional capacity procedures, psychiatric review procedures and the file realignment process. In addition, there have been numerous other smaller changes each of which has stressed the claims process in some way. The collective impact of these changes has been very significant. It is, however, impossible to specifically measure as the impact of them has been offset to varying degrees by automation occurring during the same time. Their total effect on processing time, however, is much greater than is apparent. The increased efficiency gained through automation has prevented the further expansion of processing time that would otherwise have resulted from these program changes.

The fact that these changes in program lead to an increase in processing time is in no way intended to imply that they have not had a positive effect on program. They were directed at addressing need for greater program consistency and many other issues that have been of national concern and in my opinion they have positively effected these areas. They did, however, carry with them the price of an increase in the time needed to document and adjudicate claims.

QUESTION 2

I understand staff cuts have been offset somewhat by automation. A GAO report published in September said that the Social Security Administration's plan to modernize with computers lacked detail. Has that been your experience?

From my experience, I would state that the original impetus for automation in the Disability Determination Services (DDS's) came from within the DDS's. There have been 6-8 states that are more progressive in the area of automation and SSA has tended to follow the direction these states have taken. The automation projects implemented in recent years had originally been directed at improving service rather than reducing personnel needs. Thus when the need to accommodate reductions in staff authorizations arose the benefits of automation were redirected at offsetting these reductions. Therefore the benefits of automation have not really been available to address desired reductions in processing time.

Based on the above, I must agree that SSA's plan to modernize computer system in the DDS have had little detail. I cannot comment on the overall SSA automation as I do not have detailed information regarding this area.

QUESTION 3

What about overall planning from the Social Security Administration? Do you get much guidance or leadership from them?

Staff levels, productivity expectations, quality goals, rates of medical purchase etc. are essentially set by SSA. Some variations from these imposed levels is possible through negotiation, but SSA must concur with any changes. The procedures to be used in documenting and adjudication of claims is rather specifically set out in the Program Operations Manual

System (POMS) and administrative and fiscal reporting requirements are detailed and frequent. There are ongoing discussions with SSA regarding general operations, but essentially it is up to the DDS to handle the workload within the resources provided.

A major barrier to planning is the budget situation. In each of the last 3-4 years, the DDS has had to operate within a series of brief funding periods. This year is typical. Between 10/1/89 and 2/28/90 there have been 5 separate funding periods and the total funding available for the year is still unknown. Long range and iterim period planning is not possible in such a situation and one is forced into an ongoing reaction type management.

QUESTION 4

Mr. Herman, I understand that your claims are sometimes sent to other states, such as Michigan. Who determines whether and when that would happen? Is there a sound system in place to balance workloads?

Some Ohio claims were sent to Michigan in previous years. I do not have the exact number immediately available, but the total would not have exceeded 10,000 over a three year period during which this occurred. Nearly all the claims involved were continuing disability reviews.

Early in the accelerated continuing disability review process, a Governor's Directive was issued placing a moratorium on the continuing review processes. This moratorium stayed in effect during the Holden vs Heckler class action which was filed at that time. Also the 1984

Disability Reform Legislation was implemented at the same time. The collective effect of these three factors caused Ohio to have a peculiarly large backlog of claims awaiting continuing disability review. It was from this backlog that claims were taken to be worked by Michigan which was in a very positive staffing situation at the time.

The decision to transfer claims from Ohio to Michigan resulted from a mutual agreement between SSA and the two states.

I have heard that transfer similar to that previously used in Ohio have also occurred elsewhere, but I have no reliable information.

The workload balancing that takes place is based primarily on actuarial projections regarding workloads and productivity levels prescribed by SSA. A level of production for each authorized full time equivalent staff (FTE) is established. The FTE is then divided into projected workload and the result is the number of staff FTE's authorized.

QUESTION 5

I'm sure you listened carefully to Mr. Braverman's testimony. Please comment on his suggestions for expanding medical evidence and allowing claimants' representatives to view medical and vocational evidence before a hearing?

I feel in no way qualified to comment on the appropriateness of Mr. Braverman's suggestion regarding the availability of evidence to claimant representatives prior to a hearing.

QUESTION 6

There's a large gap between your agency and the administrative law judges. Those judges are, in fact, dealing with evidence that you never see. In your opinion, what would be the benefits -- or drawbacks -- of holding face-to-face interviews with some claimants?

There may be benefits to holding face-to-face interviews with some claimants, but I do not think it would effect the final decision in a large number of claims that are now disallowed. Identification of those claims in which this is likely to be of benefit would be critical as over 45,000 initial claimants were found not disabled in 1989 in Ohio. Holding an interview with even a fraction of these people would be a very significant administrative problem. Thus identification of situations where this is most likely to effect a decision would be critical.

Also, since one would need substantial factual information about a person to decide first whether they were likely to be disallowed and secondly that an interview may greatly reduce that likelihood, the decision on whom to interview would of necessity be late in the process. Thus decision time on these would be lengthy, though the process might remove the need to appeal in some claims.

Because the DDS must base its decision on objective information, the information in the interview could not directly cause a change of decision. Such information could, however, lead to medical evaluation that might not otherwise be recognized.

In addition to these problems, I know of only 1 or 2 states that are sufficiently decentralized to reasonably carry out a face-to-face procedure in more than a small percentage of claims. The cost of this type procedure in just these states would be very major. The added cost in states such as Ohio where the agency is centralized would naturally be significantly greater.

QUESTION 7

Sheldon Braverman also has questioned the reconsideration process that occurs in your agency. What are your thoughts on that?

Mr. Braverman suggested that the reconsideration process be eliminated as he views it as a rubber stamp as only 14-16% of the initial decisions are reversed at that level and over 60% are reversed at the hearing level.

In Ohio, there are a little more than 21,000 reconsiderations done annually. The reversal rate at this level was 16% last year. About 10,000 hearings are done in the state each year by the SSA Bureau of Hearings and Appeals and the reversal rate on these has been approximately 45% in Ohio. If the reconsideration step were eliminated without at the same time making major changes in the initial evaluation process, the hearing level would be innundated. Is there any reason to believe that the 21,000 who now apply for reconsideration would not simply ask for a hearing instead? The structure to handle such a caseload at the hearing level simply does not exist and one would question whether it should.

Mr. Braverman placed great significance on the fact that the reversed rate at reconsideration was "only 16%" in BDD. Since, however, both the initial and reconsideration are done by the Bureau of Disability Determination, using the same evaluation criteria at a point only a few weeks apart, I find this 16% reversal rate not at all surprising.

As stated above, the rate of reversal at the hearing level is approximately 45% in Ohio, but I don't feel this can be viewed as an indicator of decision accuracy in BDD. BDD decisions are subject to review by the SSA Disability Quality Branch. Results of this review show that BDD case documentation and decision accuracy are generally consistent with SSA program guides and policy as outlined in the SSA Program Operational Manual System (POMS). Considering this, it is difficult to view the reversed rate at the hearing level as indicative of anything in regard to the initial and reconsideration level, other than the result of a completely different decision process, which I truly believe it to be. Just eliminating the reconsideration without bringing these two decision processes into greater concurrence will not resolve the problem. It may, in fact, make it worse while extending the time needed for decisions.

QUESTION 8

Mr. Herman, some years back, there was overt pressure on administratiave law judges to reduce the number of benefits they allowed. Have you experienced any kind of political pressure one way or another?

This has never occurred. Allowance and denial rates are reported, but no desired level of either has ever been indicated or insinuated to me.

Senator METZENBAUM. The hearing is adjourned.

[Whereupon, at 11:36 a.m., the subcommittee was adjourned, subject to the call of the Chair.]

○